FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPENDIX TO RESPONDENTS' JOINT BRIEF

(SEE INSIDE FRONT COVER FOR LIST OF COUNSEL FOR RESPONDENTS JOINING HEREIN)

LIST OF COUNSEL

ROBERT C. KECK
JAMES G. HIERING
VALENTINE A. WEBER, JR.
KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
Chicago, IL 60606
Counsel for United States Gypsum Company

CLOYD R. MELLOTT
WILLIAM B. MALLIN
J. GARY KOSINSKI
D. RICHARD FUNK
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, PA 15219
Counsel for Georgia-Pacific Corporation

CLARK M. CLIFFORD
CARSON M. GLASS
THOMAS RICHARD SPRADLIN
BARRY J. ISRAEL
CLIFFORD, GLASS, McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for Messrs. Colon Brown and J. P. Nicely

H. FRANCIS DELONE
STEPHEN A. STACK, JR.
JOHN F. WILSON, III
MARI M. GURSKY
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Counsel for National Gypsum Company

W. DONALD McSWEENEY
WILLIAM A. MONTGOMERY
JOSEPH R. LUNDY
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
Counsel for The Celotex Corporation

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Counsel for Andrew J. Walt

APPENDIX TO RESPONDENTS' JOINT BRIEF

This Appendix contains Appellants' briefs in the Court of Appeals as follows:

Appellants' Joint Brief.....pp. 1-183
Appellants' Joint Reply Brief.....pp. 1-60

These briefs are submitted as an appendix for the Court's convenience because (1) they are referred to in Respondents' Joint Brief in this Court with respect to the Government's misstatements of facts in its brief and (2) they make available Respondents' arguments of the issues not decided by the Court of Appeals, should this Court be inclined to consider those issues.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 75-1836 through 75-1842.

UNITED STATES OF AMERICA,
Appellee,

v.

UNITED STATES GYPSUM COMPANY,
Appellant in 75-1836,

NATIONAL GYPSUM COMPANY,
Appellant in 75-1837,

GEORGIA-PACIFIC CORPORATION,
Appellant in 75-1838,

THE CELOTEX CORPORATION,
Appellant in 75-1839,

COLON BROWN,
Appellant in 75-1840,

J. P. NICELY,
Appellant in 75-1841,

ANDREW J. WATT,
Appellant in 75-1842.

Appeals From the Verdict, Sentence and Final Judgment of the United States District Court for the Western District of Pennsylvania (Criminal No. 73-347).

APPELLANTS' JOINT BRIEF.

(See Inside Front Cover for Listing of Counsel)

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

ROBERT C. KECK
JAMES G. HIERING
VALENTINE A. WEBER, JR.
KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
Chicago, IL 60606
Counsel for United States Gypsum Company

CLOYD R. MELLOTT
WILLIAM B. MALLIN
BARTON Z. COWAN
J. GARY KOSINSKI
D. RICHARD FUNK
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, PA 15219
Counsel for Georgia-Pacific Corporation

PAUL C. WARNKE
THOMAS RICHARD SPRADLIN
CLIFFORD, WARNKE, GLASS, McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for Messrs. Colon Brown and J. P. Nicely

H. FRANCES DELONE
ALFRED W. CORTESE, JR.
JOHN F. WILSON, III
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Counsel for National Gypsum Company

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
JOSEPH R. LUNDY
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
Counsel for The Celotex Corporation

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Counsel for Andrew J. Watt

INDEX TO BRIEF.

	Page
STATEMENT OF SUBJECT MATTER JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STANDARD OF REVIEW	4
STATEMENT OF THE CASE	5
A. Nature of the Case	5
B. History of Proceedings	5
C. Facts Relevant to the Issues on Appeal	7
1. The Gypsum Board Industry	7
2. Economic Evidence of Competition in the Gypsum Industry	9
3. The Evidence Relied Upon by the Prosecution	17
SUMMARY OF ARGUMENT	22
ARGUMENT	26
I. The Lawful Purposes of Defendants' Verification Should Have Precluded Submission of That Issue to the Jury; Instead the Verification Issue Was Improperly Submitted Under Erroneous Instructions Which Made Compliance With One Antitrust Law Violative of Another	26
A. The Sherman Act Permits Competitors to Verify Reported Lower Prices or More Favorable Terms of Sale in Order to Comply With the Robinson-Patman Act or to Prevent Customer Fraud	28
1. The "Meeting Competition" Defense Requires Independent Investigation or Verification of Customers' Claims	33
2. Verification of Prices With Competitors in Good Faith Compliance With the Robinson-Patman Act Is Not a Sherman Act Violation	35

INDEX TO BRIEF (Continued).

Page

B. The Verification Issue Should Never Have Been Submitted to the Jury 38

C. The Trial Court's Instructions to the Jury on the Verification Issue Were Erroneous and Prejudicial 48

1. The Trial Court Prejudicially Mishandled the Verification Issue During Trial 48

2. The Final Charge Erroneously Equated the Purpose of Defendants' Verification With Its Effect and Improperly Instructed the Jury to Presume That the Verification Was for an Unlawful Purpose 51

3. The Trial Court Did Not Adequately Instruct the Jury Concerning Defendants' Right to Protect Themselves Against Customer Fraud 58

4. The Trial Court Improperly Refused to Allow the Jury to Consider the Relevance of Legal Advice to Defendants That Verification Was Lawful 60

D. The Policy of the Nation's Antitrust Laws Is Not Served by a Statutory Construction That Holds Compliance With One Law to be a Violation of Another 62

II. Defendants Are Entitled to Judgments of Acquittal Because the Prosecution's Evidence Consists of a Hodgepodge of Unconnected Episodes That Are Insufficient, Singly or Collectively, to Prove a Nationwide Price-Fixing Conspiracy Within the Statutory Period 66

A. No Antitrust Conspiracy Existed Within the Statutory Period 68

INDEX TO BRIEF (Continued).

Page

1. The May 1, 1969 List Price Changes 71

2. The December, 1970 "Prompt Payment" Discount Withdrawal on the West Coast 79

3. The May-June, 1971 Wooden Pallet Decisions 80

4. Lower Prices in the Southwest in 1970 82

B. Events in the Pre-Statutory Period Are Insufficient to Establish the Antitrust Conspiracy Charged 85

1. The Claude Huckleberry/Texas Gypsum Complaints, 1960-65 86

2. Price and Credit Term Announcements in 1965 and 1966 90

3. The Wooden Pallets Discussion in December, 1966 93

4. Withdrawal of the Prompt Payment Discount in 1968 96

C. There Was No Substantial Evidence of the Single Nationwide Price-Fixing Conspiracy Charged in the Indictment and Allegedly Extending From 1960 Through 1973 98

III. Defendants Were Severely Prejudiced by the Trial Court's Repeated Errors and Its Partiality Toward the Prosecution 103

A. The Trial Court Prejudicially Refused to Give a Proper Final Charge on Key Conspiracy Law Principles 103

1. A "*Kotteakos*" Instruction on Single Rather Than Multiple Conspiracies Was Required But Not Given 104

2. The Court Refused to Instruct the Jury to Determine "Scope and Purpose" and to Consider It Separately as to Each Defendant 106

Page

3. The Jury Was Not Permitted to Consider Evidence of Vigorous Price Competition as Bearing on the Issue of Withdrawal and Abandonment From an Alleged Price-Fixing Conspiracy 108

B. Dismissal of the Indictment Is Required Because Defendants Were Seriously Prejudiced by the Prosecution's Excessive Pre-Indictment Delay .. 113

1. The Prosecution Unduly Delayed Commencing This Prosecution 115

2. Defendants Suffered Actual Prejudice as a Consequence of the Prosecution's Pre-Indictment Delay 119

3. An *A Fortiori* Case for Dismissal Is Presented Under the Marion Rationale Because the Prosecution's Delay Pre-Dated the Applicable Limitations Period 121

C. The Jury Verdict Was Contaminated by Consideration of Incompetent, Inflammatory Hearsay Evidence 122

1. The Requirements of the Co-Conspirator Declaration Exception Were Ignored by the Trial Court 123

2. The Trial Court Paid No Heed to the Requirements of the Business Record Rule .. 125

3. The Prosecution Was Improperly Permitted to Adduce Inflammatory, Prejudicial Evidence of Past Antitrust Complaints and Litigation 129

D. The Trial Court's Partiality for the Prosecution Necessarily Prejudiced Defendants 131

INDEX TO BRIEF (Continued).

Page

1. The Final Instructions Clearly Favored the Prosecution in Their One-Sidedness 132

2. The Trial Court Was Not Evenhanded in Its Control of Witness Examinations and Commented Prejudicially on Defendants' Evidence 134

Appendix A 138

Appendix B 140

IV. Grave Prosecutorial Misconduct Deprived Defendants of a Fair Trial 144

A. The Prosecution Asserted and Insinuated to the Jury Alleged "Facts" Outside the Record and Misstated and Misconstrued Evidence Which Was in the Record 145

B. The Prosecution Engaged in Improper and Unfair Examinations of Witnesses 150

C. The Prosecutor Attempted to Secure a Verdict by Blatant Appeals to Jury Passion and Prejudice . 155

D. Defendants' Convictions Must Be Reversed Because the Severity and Frequency of the Prosecution's Misconduct Poisoned the Trial 159

V. The Trial Court's Coercion of the Deadlocked, Ill and Exhausted Jury Requires Reversal of the Verdicts 163

A. The Trial Court Erred by Refusing to Declare a Mistrial When the Ill and Exhausted Jurors Were Unable to Reach a Verdict 163

B. The Trial Court Erred by Directly Pressuring the Jury Into Its Verdicts Through the Use of Repetitive and Erroneous "Dynamite" Instructions, Including One Improperly Given in a Private Meeting With the Jury Foreman 173

CONCLUSION 183

TABLE OF CITATIONS.

Cases:	Page
Ah Fook Chang v. United States, 91 F. 2d 805 (9th Cir. 1937)	179
American Column & Lumber Co. v. United States, 257 U. S. 377 (1921)	32
American Tobacco Co. v. United States, 147 F. 2d 93 (6th Cir. 1944), affirmed 328 U. S. 781 (1946)	67, 86
Banana Distributors, Inc. v. United Fruit Co., 1962 Trade Cases ¶ 70,368 (S. D. N. Y. 1962)	131
Barnes v. United States, 412 U. S. 837 (1973)	54
Belliston v. Texaco, Inc., 455 F. 2d 175 (10th Cir. 1972), cert. denied 408 U. S. 928 (1972)	28, 32, 33, 36, 37, 38, 39, 41
Belmont Industries, Inc. v. Bethlehem Steel Corp., 512 F. 2d 434 (3d Cir. 1975)	131
Berger v. United States, 295 U. S. 78 (1935)	64, 144, 145, 148, 151, 153, 154, 160, 162
Bouie v. City of Columbia, 378 U. S. 347 (1964)	58
Brasfield v. United States, 272 U. S. 448 (1926)	180
Buhler v. United States, 33 F. 2d 382 (9th Cir. 1929)	110, 111
Cement Mfrs. Protective Ass'n v. United States, 268 U. S. 588 (1925)	29, 31, 32, 36, 37, 48, 55, 58, 59, 64
Chapman v. California, 386 U. S. 18 (1967)	103
Continental Baking Co. v. United States, 281 F. 2d 137 (6th Cir. 1960)	135
Commercial Standard Ins. Co. v. Gordon's Transports, Inc., 154 F. 2d 390 (6th Cir. 1946)	71
Commonwealth v. Clark, 404 Pa. 143 (1961)	164
Commonwealth v. DiFrancesco, 329 A. 2d 204 (Pa. 1974)	54
Commonwealth v. Turner, 317 A. 2d 298 (Pa. 1974)	54
Corn Products Refining Co. v. FTC, 324 U. S. 726 (1945)	34
Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F. 2d 199 (3rd Cir. 1961), cert. denied, 369 U. S. 839 (1962)	70

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
Di Marco, et al. v. USG et al., E. D. Pa., CA #31766	63
Di-Wal, Inc. v. Fibreboard Corp., CCH 1970 Trade Cases ¶ 73,155 (N. D. Cal. 1970)	28
Dugan Drug Stores, Inc. v. United States, 326 F. 2d 835 (5th Cir. 1964)	151
Dunn v. United States, 307 F. 2d 883 (5th Cir. 1962)	158, 160
Dutton v. Evans, 400 U. S. 74 (1970)	123
Forster Manufacturing Co. v. FTC, 335 F. 2d 47 (1st Cir. 1964), cert. denied, 380 U. S. 906 (1965), after remand, 361 F. 2d 340 (1st Cir. 1966)	34
FTC v. A. E. Staley Company, 324 U. S. 746 (1945)	33, 35, 36, 41
Glasser v. United States, 315 U. S. 60 (1942)	124
Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975), reh. denied, – U. S. –	31, 32
Goldlawr, Inc. v. Shubert, 290 F. Supp. 482 (E. D. Pa. 1968)	67
Gray v. Shell Oil Co., 469 F. 2d 742 (9th Cir. 1972), cert. denied, 412 U. S. 943 (1973)	28, 33, 37, 38, 52, 53, 54
Grunewald v. United States, 353 U. S. 391 (1957)	67, 86, 99, 103, 121, 130
Hall v. United States, 419 F. 2d 582 (5th Cir. 1969)	64, 150, 157
Holland v. United States, 348 U. S. 121 (1954)	71
Hurst v. United States, 337 F. 2d 678 (5th Cir. 1964)	129
Hyde v. United States, 225 U. S. 347 (1912)	109
Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743 (N. D. Cal. 1959), aff'd, 322 F. 2d 656 (9th Cir. 1963), cert. denied, 375 U. S. 922 (1963)	70
In re Winship, 397 U. S. 358 (1970)	54, 66
International Shoe Machinery Corp. v. United Shoe Machine Corp., 315 F. 2d 449 (1st Cir. 1963), cert. denied 375 U. S. 820 (1963)	130, 131
Interstate Circuit, Inc. v. United States, 306 U. S. 208 (1939)	67
Jenkins v. United States, 330 F. 2d 220 (D. C. Cir. 1964)	182

Cases (Continued): Page

Jenkins v. United States, 380 U. S. 445 (1965) ...163, 164, 174, 181
Jones v. Shell Oil Co., Civ. No. 47261 (N. D. Cal.), affirmed sub nom. Gray v. Shell Oil Co., 469 F. 2d 742 (9th Cir. 1972) 54
Klein v. American Luggage Works, Inc., 323 F. 2d 787 (3rd Cir. 1963) 46, 62, 66, 106
Kotteakos v. United States, 328 U. S. 750 (1946) ...68, 81, 99, 100, 101, 103, 104, 105, 107
Krulewitch v. United States, 336 U. S. 440 (1949) 22, 78, 103, 124, 160
Maple Flooring Mfrs. Ass'n v. United States, 268 U. S. 563 (1925) 29, 31
Marino v. United States, 91 F. 2d 691 (9th Cir. 1937) 111
Milgram v. Loew's, Inc., 192 F. 2d 579 (3rd Cir. 1951) 70
Minker v. United States, 85 F. 2d 425 (3rd Cir. 1936) 150
Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co., 513 F. 2d 102 (2nd Cir. 1975) 70
Moore v. United States, 271 F. 2d 564 (4th Cir. 1959) 71
National Dairy Products Corp. v. FTC, 395 F. 2d 517 (7th Cir. 1968), cert. denied, 393 U. S. 977 (1968) 34
NBO Industries Treadway Companies, Inc., et al. v. Brunswick Corp., et al., 1975-2 CCH Trade Reg. Rep. ¶ 60,479 (3rd Cir. 1975) 111
North Carolina v. Chas. Pfizer & Co., 1974-2 Trade Cases ¶ 75,178 (E. D. N. C. 1974) 70
Pauldino v. United States, 379 F. 2d 170 (10th Cir. 1967) ... 66
Pennewell v. United States, 353 F. 2d 870 (D. C. Cir. 1965) . 150
Pointer v. Texas, 380 U. S. 400 (1965) 135
Rivers v. Union Carbide Corp., 426 F. 2d 633 (3rd Cir. 1970) 125
Rocha v. United States, 288 F. 2d 545 (9th Cir. 1961) 101, 105
Rogers v. United States, 422 U. S. 35, 45 L. Ed. 2d (1975) .. 178
Salley v. United States, 353 F. 2d 897 (D. C. Cir. 1965) 51
Snyder v. Lehigh Valley R. R. Co., 245 F. 2d 112 (3rd Cir. 1957) 179

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

State of Arizona v. Cook Paint & Varnish Co., 1975-2 Trade Cases, CCH Trade Reg. Rep., ¶ 60,450 (D. Ariz. 1975) ..82, 96
Strauss v. United States, 376 F. 2d 416 (5th Cir. 1967) 51
Sugar Institute v. United States, 297 U. S. 553 (1936) 30
Tag Mfrs. Institute v. FTC, 174 F. 2d 452 (1st Cir. 1949) ... 31
Theatre Enterprises, Inc. v. Paramount Film Distributing Co., 346 U. S. 537 (1954) 66
Treasure Valley Potato Bargaining Ass'n v. Ore-IDA Foods, Inc., 497 F. 2d 203 (9th Cir. 1974), cert. denied, 419 U. S. 999 (1974) 32
United States ex rel. Clark v. Anderson, 502 F. 2d 1080 (3rd Cir. 1974) 58
United States v. Alper, 449 F. 2d 1223 (3rd Cir. 1971) 179
United States v. American Linseed Oil Co., 262 U. S. 371 (1923) 32
United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 (3rd Cir. 1970) 67, 126, 144, 156
United States v. Angiulo, 485 F. 2d 37 (1st Cir. 1973) 181
United States v. Arendale, 444 F. 2d 1260 (5th Cir. 1971) .. 162
United States v. Bass, 490 F. 2d 846 (5th Cir. 1974) 176
United States v. Benson, 487 F. 2d 978 (3rd Cir. 1973) 114
United States v. Bertolotti (2nd Cir. November 10, 1975) .102, 105
United States v. Bohle, 445 F. 2d 54 (7th Cir. 1971) 149
United States v. Borelli, 336 F. 2d 376 (2nd Cir. 1964), cert. denied, 379 U. S. 960 (1965) 68, 86, 98, 99, 100, 105, 107, 109, 110
United States v. Bowen, 414 F. 2d 1268 (3rd Cir. 1969) 54
United States v. Bradley, 421 F. 2d 924 (6th Cir. 1970) 71
United States v. Burley, 460 F. 2d 998 (3rd Cir. 1972) 167
United States v. Butler, 494 F. 2d 1246 (10th Cir. 1974) 71
United States v. Central Supply Ass'n, 6 F. R. D. 526 (N. D. Ohio 1947) 68, 82, 101, 104
United States v. Chester, 407 F. 2d 53 (3rd Cir. 1969), cert. denied, 394 U. S. 1020 (1969) 109

TABLE OF CITATIONS (Continued).

Cases (Continued): **Page**

United States v. Clark, 398 F. Supp. 341 (E. D. Pa. 1975) .. 114
United States v. Container Corp. of America, 393 U. S. 333 (1969) 19, 31, 32, 36, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 55, 58, 116, 117
United States v. Container Corp. of America, 273 F. Supp. 18 (M. D. N. C. 1967) 32
United States v. Dabney, 393 F. Supp. 529 (E. D. Pa. 1975) 114
United States ex rel. Leguillou v. Davis, 115 F. Supp. 392 (D. V. I. 1953), rev'd on other grounds, 212 F. 2d 681 (3rd Cir. 1954) 163, 164
United States v. DeCavalcante, 440 F. 2d 1264 (3rd Cir. 1971) 23, 68, 78, 88, 89, 98, 99, 100, 101, 103, 107, 123, 124
United States v. Delay, 440 F. 2d 566 (7th Cir. 1971) 71
United States v. DeSisto, 289 F. 2d 833 (2nd Cir. 1961) 137
United States v. Dukow, 453 F. 2d 1328 (3rd Cir. 1972), cert. denied, sub nom. Crow v. United States, 406 U. S. 945 (1972) 113, 114
United States v. Erickson, 472 F. 2d 505 (9th Cir. 1973) 114
United States v. Falcone, 109 F. 2d 579 (2nd Cir.), aff'd 311 U. S. 205 (1940) 66, 99
United States v. Fioravanti, 412 F. 2d 407 (3rd Cir. 1969), cert. denied sub nom. Panaccione v. United States, 396 U. S. 837 (1969) 165, 166, 173, 174, 175, 178, 181
United States v. Flannery, 451 F. 2d 880 (1st Cir. 1971) 175
United States v. Fry, 304 F. 2d 296 (7th Cir. 1962) 131
United States v. Fullmer, 457 F. 2d 447 (7th Cir. 1972) 155
United States v. Gambert, 410 F. 2d 383 (4th Cir. 1969) 161
United States v. General Motors Corp., 1974-2 Trade Cases ¶ 75,253 (E. D. Mich. 1974) 70
United States v. Georga, 210 F. 2d 45 (3rd Cir. 1954) 155, 160
United States v. Giacalone, 477 F. 2d 1273 (6th Cir. 1973) .. 114
United States v. Goldberg, 401 F. 2d 644 (2nd Cir. 1968), cert. denied, 393 U. S. 1099 (1969) 110
United States v. Graham, 325 F. 2d 922 (6th Cir. 1963) 151
United States v. Gray, 468 F. 2d 257 (3rd Cir. 1972) 130, 131

TABLE OF CITATIONS (Continued).

Cases (Continued): **Page**

United States v. Grimes, 413 F. 2d 1376 (7th Cir. 1969) 51
United States v. Grosso, 358 F. 2d 154 (3rd Cir. 1966), rev'd on other grounds, 390 U. S. 62 (1968) 164
United States v. Gullia, 450 F. 2d 777 (3rd Cir. 1971) 179
United States v. Gullo, 502 F. 2d 759 (3rd Cir. 1974) 151
United States v. Harmon, 379 F. Supp. 1349 (D. N. J. 1974) 114
United States v. Hayward, 420 F. 2d 142 (D. C. Cir. 1969) 155
United States v. Heinze, 361 F. Supp. 46 (D. Del. 1973) 67
United States v. Hudson, 432 F. 2d 413 (9th Cir. 1970) 154
United States v. Johns-Manville Corp., Cr. 21-118 (E. D. Pa. 1962), ABA Jury Instructions in Criminal Antitrust Cases, 482 at 512 (1965) 107, 108
United States v. Johnson, 65 F. Supp. 46 (M. D. Pa. 1[illegible] ..68, 86
United States v. Kissel, 218 U. S. 601 (1910) 67, 86
United States v. Klein, 515 F. 2d 751 (3rd Cir. 1975) 66, 107, 130, 131
United States v. Kompinski, 373 F. 2d 429 (2nd Cir. 1967) .69, 128
United States v. Lansdown, 460 F. 2d 164 (4th Cir. 1972) .. 164
United States v. Leach, 427 F. 2d 1107 (1st Cir. 1970), cert. denied, 400 U. S. 829 (1970) 51
United States v. Lester, 282 F. 2d 750 (3rd Cir. 1960), cert. denied, 364 U. S. 937 (1961) 101
United States v. Marion, 404 U. S. 307 (1971) ...113, 114, 119, 121
United States v. Morgan, 1953 Trade Cases ¶ 67,586 (S. D. N. Y. 1953) 77
United States v. Morris, 485 F. 2d 1385 (5th Cir. 1973) 135
United States v. Nazzaro, 472 F. 2d 302 (2nd Cir. 1973) 137
United States v. Neal, 320 F. 2d 533 (3rd Cir. 1963) 178
United States v. Nettl, 121 F. 2d 927 (3rd Cir. 1941) 153, 154
United States v. Newman, 490 F. 2d 139 (3rd Cir. 1974) ..145, 160
United States v. Noble, 155 F. 2d 315 (3rd Cir. 1946) 178
United States v. Oregon State Medical Society, 95 F. Supp. 103 (D. Ore. 1950), affirmed 343 U. S. 326 (1952) 131
United States v. Ott, 489 F. 2d 872 (7th Cir. 1973) 162

Cases (Continued): Page

United States v. Partin, 1972 Trade Cases ¶ 73,999 (N. D. Ga. 1972) 71
United States v. Perez, 489 F. 2d 51 (5th Cir. 1973) 105
United States v. Perlstein, 120 F. 2d 276 (3rd Cir. 1941) 153, 154
United States v. Rodrigues, 491 F. 2d 663 (3rd Cir. 1974) .. 123
United States v. Rogers, 289 F. 2d 433 (4th Cir. 1961) 174
United States v. Russano, 257 F. 2d 712 (2nd Cir. 1958) ..101, 105
United States v. Saunders, 325 F. 2d 840 (6th Cir. 1964), cert. denied, 379 U. S. 978 (1965) 71
United States v. Sawyer, 210 F. 2d 169 (3rd Cir. 1954) 51
United States v. Schartner, 426 F. 2d 470 (3rd Cir. 1970) 149
United States v. Schneiderman, 106 F. Supp. 892 (S. D. Cal., 1952) 67
United States v. See, 505 F. 2d 845 (9th Cir. 1974), cert. denied, 420 U. S. 992 (1975) 164
United States v. Silvern, 484 F. 2d 879 (7th Cir. 1973) 175
United States v. Small, 443 F. 2d 497 (3rd Cir. 1971) 145
United States v. Sprengel, 103 F. 2d 876 (3rd Cir. 1939) 150
United States v. Standard Oil Co., 316 F. 2d 884 (7th Cir. 1963) 62, 66, 106, 131
United States v. Stein, 249 F. Supp. 873 (E. D. Pa. 1966) 67
United States v. Stein, 456 F. 2d 844 (2nd Cir. 1972), cert. denied, 408 U. S. 922 (1972), reh. denied, 409 U. S. 898 (1972) 114
United States v. Tucker, 267 F. 2d 212 (3rd Cir. 1959) 145
United States v. United States Gypsum Co., Civil No. 71-2467 (N. D. Calif. filed 12/30/71) 117
United States v. United States Gypsum, Crim. No. 1042-73 (D. D. C., filed December 27, 1973) 118
United States v. United States Gypsum Co., 383 F. Supp. 462 (W. D. Pa. 1974) 6, 27, 113
United States v. Van de Carr, 343 F. Supp. 993 (C. D. Cal. 1972) 69

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969) 105
United States v. Watson, 489 F. 2d 504 (3rd Cir. 1973) 51
United States v. Williams, 523 F. 2d 1203 (5th Cir. 1975) 150
United States v. Wilson, 357 F. Supp. 619 (E. D. Pa. 1973), appeal dismissed and pet. for panel reh. denied, 492 F. 2d 1345 (3rd Cir. 1974), rev'd on other grounds, 420 U. S. 332 (1975), aff'd on remand 517 F. 2d 1400 (3rd Cir. 1975) 114
United States v. Wohl Shoe Company, 369 F. Supp. 386 (D. N. Mex. 1974) 32
United States v. Young, 464 F. 2d 160 (5th Cir. 1972) 51
Venzie Corp. v. U. S. Mineral Products Co., 1975-2 Trade Cases, ¶ 60,481 (3rd Cir. 1975) 69, 70, 75, 79, 81, 96, 128
Viereck v. United States, 318 U. S. 236 (1943) 144, 155
Virgin Islands v. Gereau, 523 F. 2d 140 (3rd Cir. 1975) 164
Viviano Macaroni Co. v. FTC, 411 F. 2d 255 (3rd Cir. 1969) 34, 35, 41, 50, 64
Wagner v. United States, 263 F. 2d 877 (5th Cir. 1959) ...148, 149
Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N. D. Cal. 1971) 23, 25, 27, 28, 33, 37, 38, 48, 63, 90, 110, 111, 115, 116, 118, 119, 128, 129, 130
Webster v. Sinclair Refining Co., 338 F. Supp. 248 (S. D. Ala. 1971) 28, 33, 37, 38
Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F. 2d 533 (2nd Cir. 1959), cert. denied, 360 U. S. 912 (1959) 67
Wong Sun v. United States, 371 U. S. 471 (1963) 123

TABLE OF CITATIONS (Continued).

Statutes: **Page**

Robinson-Patman Act, 15 U. S. C. § 13(b) ..... 2 et seq.
Sherman Act, 15 U. S. C. § 1 ..... 2 et seq.
18 U. S. C. § 1291 1
18 U. S. C. § 3282 14
United States Constitution:
Fifth Amendment 163
Sixth Amendment 135, 163, 164

Rules: **Page**

Federal Rules of Criminal Procedure:
Rule 30 132
Rule 43 178

TABLE OF CITATIONS (Continued).

Miscellaneous: **Page**

BNA, Antitrust Trade Reg. Repts., No. 742 (12/9/75, p. A-21) 27
Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959) 110
Eaton, The Robinson-Patman Act: Reconciling The Meeting Competition Defense With The Sherman Act, 18 Antitrust Bulletin 411, 419 (1973) 34
Jonathan C. Rose, CCH Trade Reg. Rep., #202, Nov. 11, 1975 pp. 5-7 ..... 48, 63
Note, 25 Baylor L. Rev. 357, 364 (1973) 32
Wechsler, et al., "The Treatment of Inchoate Crimes in the Model Penal Code of the A. L. I.: Attempt, Solicitation and Conspiracy, Part II," 61 Colum. L. Rev. 957, 983-84, 988 (1961) 108
III Wigmore on Evidence § 980(a) (3rd Ed.) 129
2 Wright, Federal Practice and Procedure § 482, p. 279 (1969) 51

STATEMENT OF SUBJECT MATTER JURISDICTION.

Counsel for appellants [1] certify that these appeals are from the verdicts, sentences and final judgments of the United States District Court for the Western District of Pennsylvania which apply to all parties. Jurisdiction is conferred on this Court by 18 U. S. C. § 1291.

---

1. All appellants join in this brief in seeking the entry of judgments of acquittal on grounds of insufficiency of the evidence to support the price-fixing conspiracy charged. Supplemental briefs covering specific, limited issues are being filed separately on behalf of appellants United States Gypsum, Celotex (joined in by Georgia-Pacific), Watt, Brown and Nicely. J. P. Nicely concurs in the position of all other appellants that numerous reversible errors occurred during trial, but does not seek the alternative relief of a new trial. Mr. Nicely, who recently retired, seeks only acquittal on the grounds of insufficient evidence.

STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Does verification directly with a competitor regarding a customer's claim of a more favorable price quotation constitute a violation of the Sherman Act § 1, when the purposes of such verification were to satisfy the requirements of the Robinson-Patman Act and to protect against customer fraud?

(a) Should the evidence concerning defendants' verification have been submitted to the jury as a basis for inferring a violation of the Sherman Act?

(b) Did the trial court err in its several instructions on the verification issue, including its instruction that if verification had a stabilizing effect on prices, the jury should presume as a matter of law that defendants' purpose in verifying was to stabilize prices regardless of defendants' actual purposes?

2. Was the prosecution's evidence of fragmented and unconnected episodes occurring predominantly prior to the limitations bar sufficient to sustain an inference of a unitary, nationwide price-fixing conspiracy existing within the statutory period?

3. Did the trial court commit prejudicial error (a) by its numerous faulty and confusing final instructions concerning conspiracy law and other issues, (b) by admitting prejudicial hearsay testimony and documents without proper qualification and by receiving inflammatory evidence of prior litigation and complaints to the government, and (c) by disparaging and discriminatorily limiting the defense case?

4. Were defendants denied due process by the prosecution's pre-indictment delay in light of the resulting prejudice to defendants from the concentration of the prosecution's evidence in the pre-statutory period and the loss to defendants of important testimony due to the death and unavailability of key witnesses?

5. Did the prosecution's egregious, repetitive misconduct throughout the trial deprive defendants of a fair trial?

6. Does the trial court's coercion of an exhausted, ill, and hopelessly deadlocked jury, coupled with repeated, erroneous "dynamite" charges, require reversal?

STANDARD OF REVIEW.

In seeking acquittals as to all defendants, these appeals challenge the sufficiency of the evidence to support the verdicts. Acquittals are also sought because the trial court erred in applying the legal standard relevant to dismissals of indictments for undue pre-indictment delay. A new trial is requested in the alternative, because the trial court committed numerous prejudicial errors of law in its evidentiary rulings, instructions and other aspects of its management of the trial; because the trial court abused its discretion by not discharging the jury and declaring a mistrial in light of the repeated misconduct of the prosecution; and because the trial judge coerced the hopelessly deadlocked jury to return its verdicts.

STATEMENT OF THE CASE.

A. Nature of the Case.

These appeals are taken from judgments entered on verdicts of guilty against four corporate and three individual defendants for alleged violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. The Indictment charged six corporations and ten individuals with participation in a nationwide conspiracy to fix the prices, terms and conditions of sale and methods of handling of gypsum board products from sometime prior to 1960 through December 27, 1973 (40a-47a).[2] Appellants (hereafter "defendants") are United States Gypsum Company ("USG"), National Gypsum Company ("National"), Georgia-Pacific Corporation ("G-P"), The Celotex Corporation ("Celotex"), Andrew J. Watt, Colon Brown, and J. P. Nicely. Each corporate defendant manufactures, sells and distributes gypsum board products which are widely used in building construction. Andrew Watt is Executive Vice President of USG. Colon Brown is Chairman of the Board of National. J. P. Nicely recently retired as Vice President, Sales, of National's Building Products Division.

B. History of Proceedings.

The Indictment was returned on December 27, 1973 (40a-47a). After an evidentiary hearing in September,

2. Appendix citations are supplied where available. Citations to the trial transcript are given in every case. In some instances the transcript references may cover more material than is contained in the Appendix so that parallel Appendix citations may contain only part of the transcript reference. The form of abbreviations used is as follows: Appellants' Brief, Appell. Brief; References to other sections of brief, I A, etc.; Appendix, pages—"a" and exhibits—"ex"; Bill of Particulars, B. P. [page]; Defendants' Requests for Preliminary Instructions, Def. Req. Prel. Inst. [#]; Defendants' Requests for Final Jury Instructions, Def. Req. Final Inst. [#]; Defendants' Supplemental Requests, Def. Supp. Req. [#]; Defendants' Final Requests, Def. Final Req. [#]; Evidentiary Hearing,

1974, motions by all original defendants to dismiss for excessive preindictment delay were denied. *United States v. United States Gypsum Co.*, 383 F. Supp. 462 (W. D. Pa. 1974) (49a-64a).[3] Trial commenced on March 3, 1975 and extended over four months. The trial court denied motions for acquittal made by each defendant at the close of the prosecution's case and renewed at the close of the entire case (Tr. 8141; 3747a, Tr. 13,756).

The jury was sequestered and began its deliberations on Tuesday, July 8, 1975 (3952a, Tr. 14,953). By Friday the foreman reported that the physical and mental condition of the jurors had begun to deteriorate (4000a, Tr. 15,128; 4001a-4002a, Tr. 15,130-31; 4004a-4005a, Tr. 15,134). By Sunday, the sixth day of deliberations, the jury reported itself deadlocked: "We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors" (4061a, Docket Entry #322). The trial judge directed the jurors, for the third time, to continue their deliberations "with a view toward reaching an agreement" (4017a-4018a, Tr. 15,154-55).

On the seventh day of deliberations, the foreman asked to meet with the judge "to discuss the condition of the

2. (Cont'd.)
Ev. H. [page]; Federal Rules of Criminal Procedure, Rule [#] F. R. Crim. P.; Government's Request to Charge, Gov't Req. Charge [#]; Pretrial Conferences, Pre. Conf., [date]; Trial judge's conference with jury foreman Russell, R. Tr. [page]; Trial Transcript, Tr. [page]. Trial Exhibits-Defendants: C. Brown–Brown [#]; J. Nicely–Nicely [#]; A. Watt–Watt [#]; USG–USG [#]; National –NG [#]; G-P–G-P [#]; Celotex–CEL [#]; Defendants' Joint–DJX [#]; Government–GX [#]; Evidentiary Hearing Defendant Exhibits–Ev. H. DX [letter–#].

3. On January 16, 1975, two corporate defendants, The Flintkote Company and Kaiser Gypsum Company, and seven individual defendants elected to plead *nolo contendere* (Hearing on Change of Pleas 1/16/75, Docket Entry #133) after first receiving assurances from the trial judge that no prison sentence would be imposed (Pre. Conf. 12/4/74, p. 7, Docket Entry #121).

Jury and further guidance" (4061a, Docket Entry #322). The trial judge met with the foreman alone at mid-day.[4] The foreman was deeply concerned about the mental depression and physical condition of the jurors, at least eight of whom were taking pills. He reported that the jurors were "very distraught" (4065a, R. Tr. 2) and he thought that one of them was "going to jump out the window" (4065a, R. Tr. 3). The foreman confirmed the trial judge's description of the jury as "hopelessly deadlocked" (4068a, R. Tr. 6) and stated that the division among the jurors could not be settled by the evidence: "We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony" (4067a, R. Tr. 4). After confirming the foreman's understanding that the court was "after a verdict one way or the other" (4069a, R. Tr. 7), the trial court instructed him to tell the jurors to continue deliberating to see if they could come to a verdict (4070a, R. Tr. 8). At 10:45 a.m. the next morning, July 15th, verdicts of guilty were returned as to each defendant (Tr. 15,183).

C. Facts Relevant to the Issues on Appeal.

1. The Gypsum Board Industry.

Gypsum board products include wallboard, lath and sheathing (40a). Each is a "gypsum sandwich" made of paper, vinyl or other specially-treated exterior coverings over calcined gypsum. Gypsum board is made and sold in a variety of sizes and thicknesses (Tr. 8785). Over the

4. The trial judge would not permit counsel to be present and impounded the transcript of his private meeting with the foreman (4022a-4023a, Tr. 15,165). This Court, on September 16, 1975, ordered the transcript released to defendants (4062a-4063a).

years, the largest selling product has been ½" wallboard with a plain vanilla paper cover (2134a, Tr. 8785-87). Half-inch wallboard represents over 50% of all gypsum board sales (2134a, Tr. 8787; Tr. 8833; 2369a, Tr. 9726) and was referred to by a chief prosecution witness as the "bellwether" product of the industry (612a, Tr. 1861).

With the exception of G-P, the corporate defendants and several other producers [5] were engaged in the manufacture, distribution and sale of gypsum board products throughout the period from 1960 through 1973 and earlier. G-P did not enter the gypsum board industry until April, 1965 when it acquired the Bestwall Gypsum Company ("Bestwall") (1ex-3ex, GX 7). USG is the largest manufacturer of gypsum board products with a share of national sales which has varied from a high of 47% in 1960 to 32% in 1973. National is the next largest producer of gypsum board with a share ranging from 30% in 1960 to 24% in 1973. G-P's national share, as the third largest producer, varied annually from about 10% to 13% during the period 1966 through 1973. Celotex is the smallest producer among the corporate defendants with an annual national share of from 6% to 9% (50ex, GX 7, Schedule "C").

Each corporate defendant manufactures and sells diversified product lines of other materials (2520a-2521a, Tr. 10,314-16; 3058a, Tr. 11,785; USG 60). For example, gypsum product sales account for only 4% to 8% of G-P's annual sales revenues (2760a, Tr. 10,902). Over the years,

5. During the period 1960 to 1973, there were eleven other producers of gypsum board in competition with defendants. They are: American Gypsum Company, California Gypsum Products, Inc., Fibreboard Corporation, GAF Corporation (Ruberoid), Grand Rapids Gypsum Company, Johns-Manville Corporation, Kaiser Gypsum Company, Inc., Republic Gypsum Company, Texas Gypsum Company, Inc., The Flintkote Company, and Weyerhaeuser Company (Dierks). All except two (Fibreboard and GAF) were still viable in 1973 and had enjoyed increased sales revenue over earlier years (50ex, GX 7, Schedule "C").

substantial "buy-sell" arrangements and patent licensing have existed in the gypsum industry, some of which have benefited smaller gypsum producers (Tr. 2321; 838a-840a, Tr. 2359-61).[6] Because product innovation and improvement were important competitively, National and USG were locked continuously in major patent litigation against each other during the 1960's (2518ex-2582ex, Brown 1-57).

Throughout the period 1960-73 and earlier, nearly all gypsum producers supported the Gypsum Association, which performed numerous necessary and worthwhile functions such as safety-rating procedures (310a-313a, Tr. 486-89), cooperation with building code bodies (314a, Tr. 491), promotion of gypsum products (313a, Tr. 489-90), and consultation with other industry groups, such as railroads, to promote safer transportation and materials handling practices (315-317a, Tr. 496-500).

2. Economic Evidence of Competition in the Gypsum Industry.

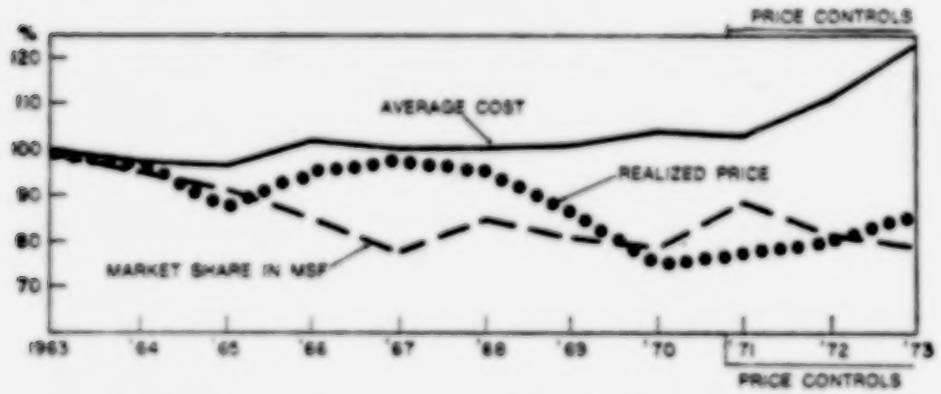
The economic evidence in the record is not contested. On the principal gypsum board product, ½" wallboard, average prices nationwide declined significantly from the beginning to the end of the alleged conspiratorial period. USG's average realized or mill net price for ½" wallboard dropped from $42.55 per thousand square feet ("MSF") in 1961 to $35.79 in 1973 (1991ex, USG 306;

6. For example, USG sold $11-12,000,000 in insulation wool to Celotex from 1960 to 1967 (3254a-3255a, Tr. 12,723; USG 699, 702, 704, 724, 783; CEL 43-49) and sold several millions of dollars of exterior stucco to G-P, while G-P sold wood chips to USG for making wood fibre products (USG 698, 741, 743). National and USG sold gypsum board paper to competitors, including single plant producers (2639a-2642a, Tr. 10,526-28; 826a, Tr. 2304-05; USG 717, 721, 725, 727, 728, 733, 734, 737-40, 747-49, 758).

2097ex, USG 1200)—a decline of $6.76 or more than 15%[7] (3186a, Tr. 12,481). National's average mill net price also dropped from $41.13 in 1960 to $35.31 in 1973 (2149ex, NG 340; NG 341), or 14% (2150ex, NG 342; NG 343). G-P experienced a similar decline in its realized prices for wallboard (2219ex, G-P 3).

The decline in gypsum board prices occurred during a period of highly inflationary cost increases which market forces prevented gypsum producers from recapturing, and the following exhibit (2071ex, USG 654) is representative of the trends affecting each producer.

USG ½" WALLBOARD
PRICE-COST-MARKET SHARE
1963 = 100%



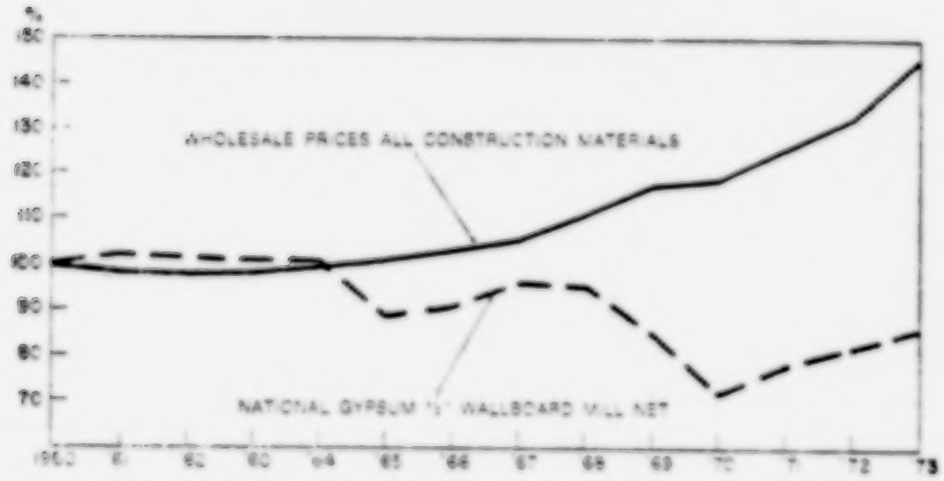
Price behavior in the gypsum board industry contrasted dramatically with that of other industries during the thirteen-year period covered by the prosecution's case.[8] While prices of other construction materials generally have increased without interruption since 1965, gypsum wall-

7. Realized or mill net prices are computed by dividing board volume sold into sales revenue reduced by freight costs (2367a-2369a, Tr. 9724-25).

8. The uncontested evidence showed that while average prices of food, apparel, and non-gypsum construction products rose sharply by 52 to 83%, the industry average for ½" gypsum board fell over 16% (3194a-3196a, Tr. 12,506-08; USG 656).

board prices have fallen as the following exhibit (2150ex, NG 342) shows.

NATIONAL GYPSUM COMPANY
½" WALLBOARD MILL NETS
COMPARED TO WHOLESALE PRICES
OF ALL CONSTRUCTION MATERIALS.
INDEX 1960 = 100%



The sharpest deterioration in actual prices of gypsum wallboard occurred during the late 1960's and 1970 when three significant competitive factors came together simultaneously. First, demand fell off sharply due to a recession in the general economy and particularly the housing market (2280a-2281a, Tr. 9307; 3180a, Tr. 12,465).[9] Second, the supply of gypsum board had significantly increased with the entry during the early 1960's of many additional producers, particularly in the Southwest (50ex, GX 7, Schedule "C"; USG 71, pp. 1-2 of part two). Third, G-P introduced a completely new marketing concept in the distribution of gypsum board products which gave its wholly-owned local distribution centers

9 Demand in the gypsum industry is largely a function of demand in the housing and construction market (2528a-2530a, Tr. 10,334-36).

authority to sell to anyone in the chain of distribution at prices determined by the local manager (Tr. 4794; 4797; 2769a-2770a, Tr. 10,915-16; 2775a-2776a, Tr. 10,923-24; 2875a-2876a, Tr. 11,180-81; 2902a-2904a, Tr. 11,282-84).

When G-P entered the gypsum business in 1965, by acquiring Bestwall, management's immediate objective was to increase Bestwall's production and sales by one-third. G-P executives recognized that this aggressiveness would necessitate a number of competitors "moving over as a result of the pressure" (2214ex-2218ex, G-P 1, p. 3). This "pressure" was exerted principally by a doubling of Bestwall's sales force through its merger with the existing G-P network of 86 distribution centers located throughout the United States (2781a-2782a, Tr. 10,959-60; 2800a-2802a, Tr. 10,984-86).[10]

Utilization of this branch distribution network enabled G-P to provide quick delivery and special service, to sell direct to the end user by bypassing the traditional "middleman" wallboard dealer, and to "wheel and deal" on price to gain additional gypsum business (2768a-2769a, Tr. 10,913-14; 2775a, Tr. 10,923; 2777a-2778a, Tr. 10,925-26; 2785a-2787a, Tr. 10,965-66; 2867a-2868a, Tr. 11,169-70; 2872a-2873a, Tr. 11,176). The prosecution stipulated that each G-P distribution center manager possessed independent pricing authority over all products, including gypsum (1365a-1366a, Tr. 4805-06), thus precluding the setting of prices by any central corporate authority. Therefore, G-P was strategically positioned to market its gypsum products more aggressively and, by 1968, as the prosecution also stipulated, had embarked on a "very strong campaign to increase their share of the market"

10. Each distribution center was operated as an independent profit center primarily distributing wood products (2759a-2760a, Tr. 10,901-02; 2769a-2770a, Tr. 10,915-16). By the end of 1973, G-P had 128 distribution centers (2763a, Tr. 10,906).

(1348a-1349a, Tr. 4742).[11] Its competitors recognized that G-P was in the "most aggressive posture" (2277a-2278a, Tr. 9299) and that G-P made it "very, very rough" on even its larger competitors (2278a-2279a, Tr. 9304).[12]

The simultaneous impact of new competitors, declining demand, and G-P's competitive inroads into its competitors' market shares soon resulted in dramatically deteriorating prices. In May, 1967, in response to widespread discounting, National announced a nationwide published price *decrease* on most gypsum board products (2125ex-2126ex, NG 28-29). By 1968, USG had begun to plan its own distribution network, L&W Supply, to compete with G-P distribution centers directly (2099a, Tr. 8482-84; Tr. 8524-26; 2298a-2299a, Tr. 9339; 2817a-2818a, Tr. 11,007-08; 3180a-3181a, Tr. 12,465-66). Later, USG also designed an interim "war zone" program, by which USG lowered its published prices to all customers around each G-P distribution center (2283a-2286a, Tr. 9310-17; 2055ex, USG 501).

11. G-P's aggressive marketing strategy was immediately successful. In October, 1967, USG lost 9 percentage points of its total market share (2057a-2058a, Tr. 8173; Tr. 8257; USG 153, 154), while G-P showed an increase in market share of 8.6 percentage points (2228ex, G-P 67).

12. Weidman of USG testified that G-P was by far the most aggressive competitor (2275a-2276a, Tr. 9283; 2277a-2279a, Tr. 9299; 2280a-2281a, Tr. 9307), while Baldwin of USG characterized it as a "dominant competitor" (Tr. 8254; 1953ex, USG 151). Duffy of USG could not think of a "more aggressive" or "more troublesome" competitor (3197a, Tr. 12,513). Kroth of National testified that throughout the 1960's G-P, on a nationwide basis, gave National the most trouble (1718a-1719a, Tr. 6277-79). Hayes of National testified that G-P's competition came from all directions and was full-scale warfare (2568a-2569a, Tr. 10,409-10). Johns-Manville described G-P as its "worst competitor" (G-P 1141). Rhyne Simpson of Republic Gypsum described G-P as "very definitely" a price cutter (833a, Tr. 2332). The competitive impact of G-P's entry into the industry is summarized at Tr. 14,287-317, 14,323-31, 14,340-44.

Contemporaneous reports within the companies reflect increasingly chaotic and downward pricing behavior in the gypsum industry during 1968—the year prior to the beginning of the statutory period on December 27, 1968 (1963ex-1965ex, USG 156; 1978ex, USG 164; 1983ex, USG 166; NG 31-34; 2277ex, G-P 265; 2280ex, G-P 284; 2284ex, G-P 316; 2287ex, G-P 318).[13] On the eve of the statutory period, in October, 1968, so much discounting was occurring in the market that contemporaneous USG documents showed that if all the business then being quoted at discounted prices were secured, the volume of board sold by USG at off-list prices would equal 134% of its entire 1967 sales volume (2064a, Tr. 8233; 1983ex, USG 166).

In 1969, the first year of the statutory period, the average realized price on ½" gypsum wallboard fell more than 10%, or about $4.00/MSF, from the 1968 average. The historical industry lows were hit in 1970, the second year of the statutory period, when average realized prices were 13% below the depressed 1969 levels, more than 20% below the pre-statutory period 1968 level and almost 30% below average prices in 1961, at the beginning of the alleged conspiracy.[14] Average wallboard prices improved moderately in 1971 through 1973 when the economy improved, inflationary forces were strong, and federal price controls requiring prior approval of price increases were in effect. Even then, the average ½" wallboard realized price

13. The statutory period covers the five years prior to the return of the Indictment on December 27, 1973. 18 U. S. C. § 3282 (1954).

14. USG's 1970 average realized price for ½" wallboard was $31.29/MSF as compared to $42.55 in 1961, $40.03 in 1968 and $36.02 in 1969 (1991ex, USG 306; 2097ex, USG 1200). National's 1970 average price was $29.55/MSF in 1970 vs. $42.15 in 1961, $39.21 in 1968 and $34.99 in 1969 (2149ex, NG 340; NG 341). USG authorized its salesmen to cut prices after receiving 18,874 reports in 1969 and 13,150 reports in 1970 that its competitors were doing likewise (1986ex, USG 301), while National did so after receiving 19,635 reports in 1969 and 17,670 reports in 1970 (2152ex, NG 349, NG 350).

in 1973 was ten percent or approximately $4.00/MSF below the 1968 pre-statutory period level.[15]

In addition to the uncontradicted contemporaneous record of declining prices and increased discounting, expert economic testimony was offered by both the prosecution and the defendants. The prosecution's expert, Dr. Richard A. Miller, during two appearances as a witness, did not give *any* opinion as to the existence or non-existence of the alleged conspiracy (1942a-1958a, Tr. 7144-7221; Tr. 7243-50; Tr. 13,460-70; 3659a-3719a, Tr. 13,472-569; 3719a-3738a, Tr. 13,576-709; 3739a-3746a, Tr. 13,713-31). Nor did he find market behavior indicative of collusion and provide any analysis or study of any economic data from which he felt even an inference of conspiracy might be drawn.

In contrast, Dr. Richard Cyert, a distinguished economist and President of Carnegie-Mellon University (Tr. 12,025; 2600ex-2605ex, DJX 1), testified that defendants had been engaged in "rampant price competition" during the entire statutory period, which was completely inconsistent with the claimed conspiracy (3085a-3086a, Tr. 12,059). That period was characterized by Dr. Cyert as one reflecting in the markets he studied "a high degree of competition" that "verges on being disorderly" (3093a-3094a, Tr. 12,090) where the picture was one of "firms really scrambling, almost on a sale-by-sale basis to try to quote a price that is going to get that particular sale" (3105a, Tr. 12,116).

Dr. Cyert based his conclusion on: (a) a detailed study of his own design, encompassing transaction prices and discounts from published prices for the principal gypsum

15. USG's average realized prices for ½" wallboard were $32.20/MSF in 1971, $33.72 in 1972, and $35.79 in 1973 (1991ex, USG 306; See USG 656). National's average ½" wallboard prices were $32.23/MSF in 1971, $34.12 in 1972 and $35.31 in 1973 (2149ex, NG 340; NG 341).

board product in eight Standard Metropolitan Statistical Areas ("SMSA") (Tr. 12,036-43; 2606ex-2622ex, DJX 2-42); (b) a review of sales of all gypsum board products made by USG, National and Celotex in each of fifty marketing areas throughout the country (3105a-3107a, Tr. 12,117-22; 3110a-3114a, Tr. 12,129-35; 2623ex-2639ex, DJX 43-61); and (c) a study of all gypsum product sales to nine large common customers of the defendant corporations (3114a-3116a, Tr. 12,137-40; 2639ex-2648ex, DJX 62-79).

Dr. Cyert found extremely wide disparity among the defendants in the actual prices they charged for ½" wallboard during the same time periods and in the same areas (3084a-3086a, Tr. 12,058-59; 3093a-3094a, Tr. 12,090; 3105a-3107a, Tr. 12,117-18).[16] In addition to wide-ranging differences in actual prices, he found widely varying discounts from list prices (3101a-3103a, Tr. 12,110-13). Price and discount disparities existed not only between different defendants, but also in the varying prices charged by the same company during the same time period in the same SMSA (3097a-3099a, Tr. 12,096-97). Very substantial quantities of wallboard were sold at the lower price ranges, *i.e.*, at larger discounts, in each marketing area (2614ex-2622ex, DJX 27-42). Frequently, nearly *all* ½" wallboard sold in an area during three month periods studied was sold

16. Dr. Cyert's pricing and discount study concentrated on the "bellwether" product, ½" wallboard. A standard selection technique was utilized so that the eight SMSA samples would be representative of price competition in all major markets (Tr. 12,039-44). The eight SMSA's studied were Anaheim, Cincinnati, Minneapolis, New Orleans, Tampa, Boston, Denver and Pittsburgh (Tr. 12,043). Every ½" wallboard transaction of each defendant was included in the study for 1969, the first year of the statutory period (except for certain National sales in Pittsburgh in the first quarter for which records were unavailable) (Tr. 12,044-45). All transactions in certain quarters of each of the subsequent four years, 1970 through 1973, were included for certain of the eight SMSA's in accordance with standard statistical sampling techniques (2606ex, DJX 2).

at discount from published list prices.[17] Dr. Cyert's view that the price data established the highly competitive nature of the gypsum industry was reinforced by his consideration of other economic indicators such as: (a) constant shifting of position in the fifty market areas (3107a-3115a, Tr. 12,119-37; 2623ex-2639ex, DJX 43-61), (b) switching of customers among defendants (3114a-3119a, Tr. 12,137-46; 2640ex-2648ex, DJX 62-79), (c) the large number of changes in published list prices (3118a-3124a, Tr. 12,146-55), and (d) the widely varied marketing and distribution techniques employed by defendants (3124a-3126a, Tr. 12,155-57).

Although Dr. Miller, the prosecution's expert, testified in the rebuttal case after Dr. Cyert had given his detailed findings of vigorous price competition, Dr. Miller did not dispute Dr. Cyert's data nor his conclusion that the gypsum industry was highly competitive throughout the statutory period.

3. The Evidence Relied Upon by the Prosecution.

The prosecution's entire case was circumstantial. Its dominant focus was on events occurring prior to 1967—two years before the statutory period commenced on De-

17. Dr. Cyert's independent study confirmed separate analyses submitted by defendants demonstrating extensive discounting from published prices both before and throughout the statutory period (USG 1104-1143; 2152ex-2170ex, NG 349-382; NG 500; CEL 1142-1151; 2607ex-2639ex, DJX 3-61). For example, during the period from September, 1968, through the summer of 1970, G-P's average market prices for ½" wallboard were substantially below its published list prices (2235ex-2239ex, G-P 99, 101, 102, 103, 106). Moreover, both these G-P "Pink Sheet" charts and National's "measles" charts (2161ex, NG 367; 2162ex, NG 368; 2169ex, NG 381; 2170ex, NG 382) established that transaction prices bore no fixed relationship to published prices, a fact also confirmed by Dr. Cyert's testimony (3100a-3104a, Tr. 12,109-14).

cember 27, 1968.[18] According to the trial court's final instructions to the jury, adopting the prosecution's Request to Charge No. 15 (4152a-4170a), there were five categories of evidence from which the prosecution claimed an inference could be drawn of defendants' participation in the nationwide price-fixing conspiracy charged in the Indictment (3874a-3888, Tr. 14,846-63). The circumstantial evidence relied upon by the prosecution as to each category is summarized below, with more detailed treatment and supporting record references reserved for those sections of the brief concerned with the insufficiency of the evidence.

(a) *Price Verification* (see *infra* at 26-65). Until mid-1968, each corporate defendant and other gypsum producers on occasion sought to verify with each other the truthfulness of a customer's claim of a competitive offer of a more favorable price, term, or other condition of sale. In the absence of sufficient data confirming the customer's claim, direct verification with competitors was regarded as legally important before extending a discriminatorily low price to the customer. Such verification avoided violations of the Robinson-Patman Act by satisfying its stringent requirements for establishing a good faith meeting competition defense. Also, verification protected the seller against customer fraud or misrepresentation.

18. The concentration of the prosecution's evidence in the pre-statutory period was foreshadowed by the admission of an Antitrust Division official just prior to approving the Indictment that, with respect to most individual defendants, "the evidence falls short of identifying specific, affirmative acts in furtherance of the conspiracy within the five-year statutory period" (B. Rashid to T. Kauper, 12/11/73; Ev. H. DXQ-39). Very late in the trial, even the trial court noted that defendants might be deprived of a fair trial by the prosecutor's "absolutely massive and gross detailed questioning" about the pre-statutory period, and admonished the prosecutor to desist in ". . . massive questioning as to '61, '62, '63, '64, and nothing within the statutory period . . ." (3375a-3376a, Tr. 12,988-89).

After mid-1968, defendants' conduct regarding price verification was non-parallel. At USG, price verification on gypsum products had stopped by mid-1968 as unnecessary in light of more rampant price discounting in the market and USG's delegation of discounting authority to its regional managers. As for National, the uncontradicted evidence shows that with three limited and unauthorized exceptions, National stopped verifying on the advice of counsel immediately upon learning of the decision in *United States v. Container Corp. of America*, 393 U. S. 333 (January 14, 1969). G-P verified approximately fifteen times between 1969 and early 1972, and not at all thereafter. Celotex continued to verify infrequently throughout the statutory period upon the advice of counsel that verification continued to be a lawful method of assuring compliance with the Robinson-Patman Act.

(b) *Published Prices and Terms* (see *infra* at 71-80; 90-97). Although the Bill of Particulars challenged every list price increase in the statutory period as conspiratorial (B. P. 30), only a list price announcement effective on May 1, 1969 was attacked at trial. The prosecution's evidence relating to that list price announcement consisted of parallel conduct and opportunity contacts. There was no evidence that the announcements resulted from an agreement. Similarly, the prosecution challenged the elimination of a single credit term effective on the West Coast until December, 1970, but again there was no evidence of prior agreement to do so.

Instead of focusing on the statutory period, the prosecution dwelled at length on evidence of published list price and credit terms effective in 1965 and 1966, the effects of which were dissipated by the vigorous price competition described above, well before the statutory period began. Evidence was offered of sporadic communications between certain defendants in 1965 related to specific special-

ized products or to particular competitive situations which arose in particular geographic areas, such as applicator allowances in Portland, Oregon, in October, 1965 and price protection against a price increase on fire-rated gypsum wallboard in September, 1965. These early, unrelated communications, combined with "opportunity contacts" and conscious parallelism were urged by the prosecution as the basis for an inference of an alleged conspiratorial agreement concerning a change in prices and pricing policies on gypsum products, effective December 15, 1965, and a subsequent change in credit and collection policies on March 1, 1966.

(c) *Job Price Protection.* "Job price protection" was a guarantee by a gypsum producer of a particular price to a contractor for a specific volume and job so that the contractor would be "protected" against subsequent price increases prior to delivery (1085a, Tr. 3229; 3245a-3247a, Tr. 12,696-98). On advice of counsel, in December, 1965 USG made available through its auditors a list of such "protected" jobs without disclosing any pricing information (Tr. 6487-88; 3193a-3194a, Tr. 12,499; 3212a-3213a, Tr. 12,569; 3247a-3249a, Tr. 12,699-700; 3368a-3369a, Tr. 12,976). No other competitor did likewise. By 1967, USG no longer maintained such a list (2056a, Tr. 8170). The record is barren for the statutory period of even the maintenance, much less the exchange, of such lists or any information on them.

(d) *Materials Handling.* Pre-statutory period evidence was introduced indicating limited communications in 1965 and 1966 among subordinate employees of defendants and other competitors relating to preferred materials handling and transportation practices.[19] There was no evidence to show that any materials handling or transportation practice was ever modified or eliminated following such communications (see *infra* at 93-96). Five years later, in May 1971, USG's Central Division Manager independently decided to discontinue the use of wooden pallets to ship gypsum board from USG's Detroit plant. His decision was based on quadrupled costs due to theft and vandalism of the pallets which at all times remained USG property. USG's announcement was followed by Michigan area competitors after it was made public. There is no evidence showing that this decision on pallets had any impact on price (see *infra* at 80-82).

19. The prosecution principally relied upon discussions at a December, 1966 meeting of a "task force" of the Gypsum Association's Materials Handling Committee at which the desirability of eliminating the use of wooden pallets in Michigan was generally recognized. On advice of counsel, no action was taken (see *infra* at 95-96).

(e) *Single Plant Producers.* Claude Huckleberry, president of Texas Gypsum Company until January, 1965, was permitted to testify to unconnected, hearsay statements allegedly made in 1961 by a deceased employee of a non-defendant that the "big boys" would try to drive Huckleberry out of business unless Texas Gypsum stopped competitive trucking practices (see *infra* at 86-90). The prosecution also sought to prove that Republic Gypsum Company was a target of conspiratorial predatory practices in 1970. At most, the evidence disclosed that gypsum prices were depressed nationally during that year, but particularly so in the Southwest due to overcapacity and low demand. Not only was there a failure of proof as to any "predatory agreement" among defendants, but uncontroverted evidence disclosed that during those years, Celotex had a large investment in Republic, the alleged victim, while National assisted Republic by supplying critically needed wallboard paper on a $350,000 line of credit and G-P licensed Republic to produce fire-rated board necessary to a full line of products (see *infra* at 82-85).

19. (Cont'd.)

SUMMARY OF ARGUMENT.

The massive record below falls far short of the substantial evidence required to convict defendants of participation in a single, nationwide price-fixing conspiracy covering all aspects of gypsum board competition from 1960 through 1973. Focusing on the relevant period covered by the statute of limitations (1969-73), there is simply no evidence of any antitrust agreement or conspiracy of any kind. In a sprawling conspiracy case such as this, "the looseness and pliability of the [conspiracy] doctrine present[s] inherent dangers," *Krulewitch v. United States*, 336 U. S. 440, 449 (1949), Jackson J., concurring, which the trial judge must guard against and control. Here, however, the trial court abdicated its essential function of admitting only competent and relevant evidence, failed to curb prosecutorial excesses, and submitted the case to the jury under improper instructions. Yet, even with all these errors, any one of which was sufficient to tip the scales against defendants, the jury's deliberations were beclouded with division and difficulty. At least some of the jurors must have perceived the absence of substantial evidence of conspiracy. Twice the jury reported itself deadlocked. Ultimately, judicial coercion—not the testimony or the documentary evidence—produced invalid and unjustified verdicts against the defendants.

I.

Central to the prosecution's price-fixing charge were its assertions that: (1) by agreement, defendants had verified with each other some of their customers' claims of lower prices offered by competitors, (2) the effect of such verification had been to stabilize prices, and (3) defendants' verification was *not* for the purpose either of avoiding price discrimination, illegal under the Robinson-

Patman Act, or of protecting against customer misrepresentation. But the evidence tendered did not support the prosecution's assertions. Rather, it showed that on the occasions when defendants had verified, they had done so to comply with Robinson-Patman and to prevent customer fraud—just as was held in a 1971 decision concerning the gypsum industry, *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971). Thus there were present "controlling circumstances" which, under an unbroken line of Supreme Court decisions, should have precluded submitting to the jury whether defendants' verification violated the Sherman Act (see *infra* at 28-48). The trial court not only failed to withdraw the verification issue from the jury but submitted it under erroneous and gravely prejudicial instructions which permitted the jury to presume that defendants' verification violated the Sherman Act, regardless of its lawful purposes, if the effect of verification was to stabilize prices (see *infra* at 48-62).

II.

Apart from verification, the balance of the prosecution's evidence consisted of a melange of stale, unconnected, and largely isolated incidents which were quite insufficient—separately or together—to show, by substantial evidence, that there existed among the defendants a "conscious commitment to a common scheme" to fix gypsum wallboard prices, as charged. The requisite evidentiary "connecting links" between such incidents were never adduced; connection was "supplied only by the prosecutor's arguments." *United States v. DeCavalcante*, 440 F. 2d 1264, 1275 (3rd Cir. 1971) (see *infra* at 66-102). Indeed, fundamental constitutional guarantees, as well as the protection of the statute of limitations, were vitiated by the prosecution's predominant reliance on stale and unconnected evidence and by its inexcusable and

prejudicial delay in initiating this prosecution (see *infra* at 113-22). Therefore, judgments of acquittal should be entered as to each defendant.

III.

In the alternative, new trials are required, not only because of the trial court's faulty instructions concerning verification, but also because, misapplying basic conspiracy law principles, the court permitted the prosecution to rely on inflammatory hearsay evidence concerning remote incidents without any proof of their connection to the defendants or to later events, and compounded the error by its refusal to give the jury proper instructions needed to guide it in its deliberations. Clear errors of law on major substantive issues were committed in the trial court's evidentiary rulings and final charge (see *infra* at 103-12; 122-33).

IV.

The lack of taut trial management encouraged the prosecutorial misconduct which pervaded the trial. Misstatement of facts in evidence, insinuation of facts not in evidence, unfair examination of witnesses, inflammatory appeals to jury prejudice—all of these tactics in the prosecutor's "bag of tricks" were tolerated and, on occasion, even excused by the court because the prosecutor is "temperamental and irrepressible" (Tr. 3452-53) or because he "is an emotional person" (Tr. 8494-98) (see *infra* at 144-62). On the principal issue of verification the prosecutor was even permitted to argue that defendants' purpose of Robinson-Patman Act compliance was "a sham conjured up for this case" (Tr. 14,698), despite his knowledge that over ten years ago two of the defendants here had asserted the same purpose in litigation then pending in the Eastern

District of Pennsylvania, and despite his (and the trial court's) intimate familiarity with Judge Zirpoli's 1971 finding, in *Wall Products*, that this was one of two "controlling circumstance" purposes "present in abundance" in a "record . . . replete with evidence" about them (326 F. Supp. at 314-15).

V.

Defendants were gravely prejudiced by the prosecution's tactics and by the slipshod and improper way in which the trial judge conducted the trial and instructed the jury. No doubt these factors created the hopeless jury deadlock despite the prosecution's failure of proof. Capping a record of egregious error, the trial court demanded that the jury reach a verdict "one way or the other" to avoid the expense of a possible retrial. In pursuit of that crass economy, the constitutional rights of defendants to a fair trial were wholly submerged and a coerced verdict was returned (see *infra* at 163-82). The acquittals to which defendants were entitled should now be entered by this Court.

ARGUMENT.

I. The Lawful Purposes of Defendants' Verification Should Have Precluded Submission of That Issue to the Jury; Instead the Verification Issue Was Improperly Submitted Under Erroneous Instructions Which Made Compliance With One Antitrust Law Violative of Another.

The central issue in this case is whether defendants' verification with competitors of the accuracy of customers' claims of lower prices purportedly offered by competitors violated Section 1 of the Sherman Act, 15 U. S. C. § 1. Relying on established Supreme Court law and recent federal decisions, defendants urge that price verification does not violate the Sherman Act when done for either of two legitimate purposes: (a) to comply with the Robinson-Patman Act by establishing a *bona fide* basis for extending a lower price to meet a reported lower price offered by a competitor, 15 U. S. C. § 13(b),[20] or (b) to prevent customer fraud. Otherwise, when a supplier is faced with a customer's claim of a lower competitive offer, as to which the supplier has insufficient data to form a good faith belief concerning its accuracy, the supplier would have to choose either to act on the customer's representation and risk violation of the Robinson-Patman Act or risk being

20. Section 2(b) of the Robinson-Patman Act, 15 U. S. C. § 13(b), permits a *prima facie* showing of price discrimination to be rebutted or justified by the seller,

> "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The Act emphasizes however, that:

> "*the burden of rebutting* the prima-facie case thus made by showing justification *shall be upon the person charged* with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. . . ." (emphasis added).

non-competitive by refraining from offering a lower price. Neither choice is consistent with the policy and purpose of the nation's antitrust laws. The prosecution adduced no evidence, as was its burden, to show that defendants had no lawful purposes for verification. On the contrary, the evidence overwhelmingly establishes the legality of defendants' purposes.

In 1971, a federal court explicitly found that price verification by gypsum wallboard manufacturers for purposes of Robinson-Patman Act compliance and prevention of customer fraud was lawful and, even in that civil case, was not a Sherman Act violation. *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 312-15 (N. D. Cal. 1971). Two years later, however, after it was apparent that the *Wall Products* holding would not be appealed, the prosecution instituted this criminal proceeding charging that defendants' verification constituted a criminal Sherman Act violation. Despite the 1971 holding that verification, in the gypsum industry, was lawful, a principal basis expressed by the government for the 1973 Indictment of the individual defendants was their "authorization of price verification" (Ev. H. DX Q-39).

Before trial commenced, the court below expressed the view that the "complex, portentious" verification issue "raises profound policy questions which go to the heart of trade regulation in this country." *United States v. United States Gypsum*, 383 F. Supp. 462, 467 n. 5 (W. D. Pa. 1974). During trial, the prosecutor referred to verification as the policing mechanism or the connecting thread of the claimed conspiracy (*See, e.g.*, Tr. 210-11; 221-22; 244-45; 248). Since trial, the chief prosecutor has urged publicly that the Robinson-Patman Act and the Sherman Act conflict and are "antithetical." BNA, *Antitrust Trade Reg. Repts.*, No. 742 (12/9/75, p. A-21). Notwithstanding the

pivotal importance of the verification issue, the trial court approached the subject with a mind set hostile to defendants' position. During trial, he informed defense counsel that, in his view, even good faith compliance with the Robinson-Patman Act could well constitute a violation of the Sherman Act (Tr. 6041-43; Tr. 7763; 3930a-3932a, Tr. 14,923-25). And, he instructed the jury to presume that defendants intended to fix prices, regardless of their actual, legitimate purposes, if the effect of verification was to stabilize prices (3884a-3885a, Tr. 14,858-59). In these and other instances, which we will point out, the trial court communicated its firmly held view that compliance with one antitrust law is a criminal violation of another antitrust law.

Recognition of the lawful character of defendants' verification vitiates the core of the prosecution's case and makes plain defendants' entitlement to acquittals. Consequently, the verification issue is treated first.

A. The Sherman Act Permits Competitors to Verify Reported Lower Prices or More Favorable Terms of Sale in Order to Comply With the Robinson-Patman Act or to Prevent Customer Fraud.

Verification by competitors of customers' claims of more favorable competitive offers does not violate the Sherman Act when done for the purpose of complying with the Robinson-Patman Act or to protect against customer fraud. *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied* 408 U. S. 928 (1972); *Gray v. Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied* 412 U. S. 943 (1973); *Webster v. Sinclair Refining Co.*, 338 F. Supp. 248 (S. D. Ala. 1971); *Wall Products Co. v. National Gypsum Co., supra*, 326 F. Supp. 295; *Di-Wal, Inc. v. Fibreboard Corp.*, CCH 1970 Trade Cases ¶ 73,155 (N. D. Cal. 1970). These cases apply established antitrust principles

first adopted by the Supreme Court in *Maple Flooring Mfrs. Ass'n v. United States*, 268 U. S. 563 (1925); and *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588 (1925), and specifically approved thereafter.

The *Maple Flooring* case involved an express agreement between competitors to exchange information regularly, including actual prices (268 U. S. at 566-67). The Supreme Court upheld the propriety of such exchanges of competitive information, notwithstanding their stabilizing effect on prices (268 U. S. at 582):

> "Persons who . . . report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information" (268 U. S. at 584).

The Court held that the "prices at which the commodity has actually been sold in the usual course of business" are "legitimate subjects of enquiry and knowledge in any industry" (268 U. S. at 585).

In *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588 (1925), the Court extended *Maple Flooring* by holding that reciprocal communications between competitors of the prices at which cement was sold under "specific job contracts" were permissible under the Sherman Act even where they related to specifically identified jobs and customers.[21] Such exchanges were ap-

21. A universal practice in the cement industry was use of the "specific job contract," a requirements contract which gave the buyer an option to obtain at the quoted price as much cement as necessary to complete the specific job. Because it was common for

proved, despite the trial court's express finding that they "tended to produce uniformity in price" (268 U. S. at 593), because their purpose was to protect against buyer fraud:

> ". . . [I]n our view the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information. . . .
>
> ". . . [W]e cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise . . . as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned." (268 U. S. 603-04, emphasis added).

Later, in *Sugar Institute v. United States*, 297 U. S. 553, 602-04 (1936), where a price-fixing conspiracy had actually been proved, the Court similarly approved the relay of "current or future prices" among competitors by striking a prohibition on such exchanges from a lower court's decree. "Such reporting . . . ," the Court said, "subject to the restrictions imposed by the decree does not appear to involve any unreasonable restraint of competition."

21. (Cont'd.)
buyers to order more cement under such a contract than could be used on the job involved, thus obtaining the benefit of the lower contract price, cement manufacturers exchanged information to prevent such deliveries from being used on other jobs not covered by the contract (268 U. S. at 594-97). This practice and its underlying purpose are precisely analogous to the "job price protection" register established by USG in 1965 and USG's endeavor to protect itself against customer fraud. (See *supra* at 20; see *infra* at 39-41).

These Supreme Court decisions were followed in *Tag Mfrs. Institute v. FTC*, 174 F. 2d 452 (1st Cir. 1949). There, the court held lawful regular transaction price exchanges by which the Institute,

> "sends out to all Subscribers daily bulletins . . . recording thousands of these off-list transactions each month, showing the name of seller, descriptions of the tag products, quantity, list price, actual price of the particular off-list transaction, and the state where the customer is located . . ." (174 F. 2d at 457).

The *Tag Mfrs. Institute* decision specifically determined that (1) compiling and disseminating published list prices and off-list actual transaction prices was permissible, even though examination of that information by competitors "will give a quite accurate picture of the current price structure in the industry" (174 F. 2d at 458), and (2) such exchanges were lawful even where there was "considerable uniformity" of list prices and actual selling prices in the industry (174 F. 2d at 460).

The trial court here seemed to believe that these authorities had been implicitly overruled by the Supreme Court's decision in *United States v. Container Corp. of America*, 393 U. S. 333 (1969). The short answer is that the *Container* decision itself cites *Maple Flooring* and *Cement* as authoritative and that, quite recently, the Court has again confirmed the continuing vitality of *Maple Flooring* and *Cement* by favorably citing each case in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 782 (1975), *reh. denied*, – U. S. –.

As *Container* itself makes clear, exchanges of price information for legitimate purposes are not proscribed, even if the exchanges result in a stabilizing effect on prices (393 U. S. at 335). As the concurring opinion of Justice

Fortas makes explicit, *Container* did not create a *per se* rule equating agreements to exchange specific price information with price-fixing agreements (393 U. S. at 338-339).[22] *Container* found the decision in *Cement* inapplicable because, in *Container*, "there was absent the controlling circumstance, *viz.*, that cement manufacturers exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a particular job" (393 U. S. at 335). Thus *Container* reaffirmed the legality of exchanging specific price information for the purpose of protecting one's "legal rights" and preventing customer fraud.[23]

The additional issue of the legality of Robinson-Patman verification was not presented in *Container*, since the defendants there did not claim that their exchanges were for the purpose of complying with the Robinson-Patman Act, nor could they have.[24] Post-*Container* deci-

22. In *Goldfarb*, the Supreme Court cited favorably Justice Fortas' opinion in *Container* (421 U. S. at 782). Lower courts have subsequently recognized that *Container* did not create a *per se* rule. *See Treasure Valley Potato Bargaining Ass'n v. Ore-IDA Foods, Inc.*, 497 F. 2d 203, 208 (9th Cir. 1974), *cert. denied*, 419 U. S. 999 (1974); *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied*, 408 U. S. 928 (1972); and *United States v. Wohl Shoe Company*, 369 F. Supp. 386, 389 (D. N. Mex., 1974). The absence of a *per se* rule involving price exchanges calls into sharp question the prosecution's decision to attack Robinson-Patman verification by proceeding criminally.

23. Confirming the absence of a legitimate purpose for the exchanges in *Container*, the majority placed principal reliance on two price-fixing decisions where express agreements existed; both the purpose *and* effect of the agreements was to suppress competition; and the agreements extended far beyond the exchange of price information. *American Column & Lumber Co. v. United States*, 257 U. S. 377, 411-412 (1921); *United States v. American Linseed Oil Co.*, 262 U. S. 371, 390 (1923).

24. In *Container*, the products were not of "like grade and quality," thus making the Robinson-Patman Act inapplicable. There, defendants were frequently beating competition and not just meeting it. *See United States v. Container Corp. of America*, 273 F. Supp. 18, 22 (M. D. N. C. 1967); Note, 25 Baylor L. Rev. 357, 364 (1973); 15 USC § 13(b). On appeal, the *Container* defendants

sions, however, expressly hold that exchanges of price information to verify customers' doubtful claims of more favorable competitive offers are lawful. *Gray v. Shell Oil Co., supra*, 469 F. 2d 742; *Belliston v. Texaco, Inc., supra*, 455 F. 2d 175; *Webster v. Sinclair Refining Co., supra*, 338 F. Supp. 248; *Wall Products Co. v. National Gypsum Co., supra*, 326 F. Supp. 295. These decisions embody two principles: (1) for a seller to establish a good faith meeting of an equally low price of a competitor under Section 2(b) of the Robinson-Patman Act, independent investigation or verification of customer reports of lower competitive prices is required and (2) when such verification is the purpose of such exchanges, they do not violate the Sherman Act.

1. The "Meeting Competition" Defense Requires Independent Investigation or Verification of Customers' Claims.

A seller bears a heavy burden in establishing a "meeting competition" defense under the Robinson-Patman Act. In *FTC v. A. E. Staley Company*, 324 U. S. 746 (1945), the Court found a seller's failure to investigate or verify prices precluded the seller's reliance on the "good faith" meeting competition defense:

> "The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. . . . The record . . . dis-

24. (Cont'd.)
mentioned Robinson-Patman once to illustrate why a *per se* rule prohibiting exchanges of price information would be unwise (Brief for Appellees, pp. 42-43). However, gypsum board is basically homogeneous and generic in nature (610a-611a, Tr. 1859-60; 3104a-3105a, Tr. 12,115) and, therefore, is a commodity of "like grade and quality" within the meaning of the Robinson-Patman Act.

> closes *no efforts by respondents to investigate or verify them*, and no evidence of respondents' knowledge of their informants' character and reliability . . ." (324 U. S. at 758, emphasis added).

Thus, reports of lower prices from salesmen or buyers, without further verification, are insufficient to carry the burden of proof imposed by Section 2(b). *See also Corn Products Refining Co. v. FTC*, 324 U. S. 726, 741 (1945).[25]

This Court's opinion in *Viviano Macaroni Co. v. FTC*, 411 F. 2d 255 (3rd Cir. 1969), summed up the stringent requirements of investigation and verification of the "meeting competition" defense which the Federal Trade Commission had been enforcing vigorously and consistently throughout the 1960's.[26] In *Viviano*, the unreliability of customer reports as a basis for establishing the "meeting competition" defense was emphasized. There, although an established and reliable customer had personally told the supplier of offers of advertising allowances from a competitor, the Commission disallowed the defense. Although sympathizing "with the difficulty facing petitioner in finding precise information as to the identity of the competitors and the amount of the offers" (411 F. 2d at

25. One commentator has observed that the courts require a defendant asserting a "meeting competition" defense to establish "an elaborate *verification* plan aimed at determining the identity of the offeror of a given lower price and, if possible, the exact offer." Eaton, *The Robinson-Patman Act: Reconciling The Meeting Competition Defense With The Sherman Act*, 18 ANTITRUST BULLETIN 411, 419 (1973).

26. *See*, e.g., *National Dairy Products Corp. v. FTC*, 395 F. 2d 517, 524, 528-29 (7th Cir. 1968), *cert. denied*, 393 U. S. 977 (1968); *Forster Manufacturing Co. v. FTC*, 335 F. 2d 47, 54-56 (1st Cir. 1964), *cert. denied*, 380 U. S. 906 (1965), *after remand*, 361 F. 2d 340 (1st Cir. 1966). In *Forster*, the court emphasized that a seller cannot establish the "meeting competition" defense by relying only on customer reports of lower price offers since the buyer wants to buy as cheaply as he can and, therefore, is induced to misrepresent competitive offers (335 F. 2d at 56).

259), this Court, stressing the seller's need for facts beyond those orally reported from buyers, affirmed the Commission's order.

> "We think that it is clear from the Supreme Court opinion in Staley that *petitioner was under a duty to investigate or verify the oral communications of* [*the customer*] as well as the reliability of [the customer] himself in view of the 'tendency of buyers to secure the most advantageous terms of sales possible'" (411 F. 2d at 259, emphasis supplied).

Similarly, this Court held that petitioner had failed to satisfy the requirements of the "meeting competition" defense as to other discriminatory concessions, even though those concessions had been based upon intimate familiarity with the particular market gained by a salesman with 18 years experience (411 F. 2d at 259).

Thus, under *Staley*, *Viviano*, and other decisions applying the Robinson-Patman law, a seller desiring to rely on the good faith meeting competition defense in lowering its prices must affirmatively verify the accuracy of any reported lower price and cannot rely merely on statements of customers or salesmen as being adequate. Absent actual competitive invoices or written quotes, the *only* source for such verification may well be the competitor who reportedly offered the lower price.

2. Verification of Prices With Competitors in Good Faith Compliance With the Robinson-Patman Act Is Not a Sherman Act Violation.

Because of the heavy burden on sellers in satisfying the Robinson-Patman "meeting competition" defense, verification of prices or terms among competitors in a good faith effort to comply with that defense cannot be held to

be a Sherman Act violation. Attempted good faith compliance with the Robinson-Patman Act thus is considered a "controlling circumstance" permitting exchanges of price information under the *Container* and *Cement* decisions.

In *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied*, 408 U. S. 928, the court considered a claim by service station operators that *Container* condemned direct exchanges of price information among major oil companies relating to gasoline prices in the Salt Lake City area. The trial court had directed a verdict for plaintiff operators on the ground that attempted Robinson-Patman compliance was not a defense to a Sherman Act charge.[27] The Court of Appeals reversed and *directed the entry of judgment for defendant*, holding that the asserted Robinson-Patman justification was sufficient as a matter of law to preclude any finding of a Sherman Act violation. The court reasoned that defendant could not be penalized under the Sherman Act for attempted compliance with the Robinson-Patman Act, since verification with competitors was necessary to satisfy the latter Act:

> "By seeking verification Texaco was simply complying with the requirements laid down in . . . *Staley*. . . . That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be necessary before Texaco could lower its prices and still be within the 'meeting competition' defense. . . . We hold that the judgment awarded under this count must be set aside" (455 F. 2d at 182).

27. The same faulty reasoning was utilized by the trial court here, which made clear its erroneous belief that ". . . if it [verification] is done for the purpose of a defense to Robinson-Patman but it violates the other section [the Sherman Act] that's a violation of the law" (3930a-3931a, Tr. 14,923-24). (See *infra* at 51-58).

The same result reached in *Belliston*, a civil case, should obtain here in a criminal prosecution.

The *Belliston* decision explicitly relied on the Ninth Circuit's similar holding in *Gray v. Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973), that exchanges of price information are not *per se* unlawful under *Container*. In *Gray*, the court went on to hold that judgment must be entered for defendant when the defendant's purpose in verifying is to comply with the Robinson-Patman Act (469 F. 2d at 747).

In *Wall Products*, which, of course, dealt with the very industry and issue under consideration here, Judge Zirpoli found the exchange of price and other information between defendants lawful because such exchanges served two legitimate purposes: protection against customer fraud, and compliance with the Robinson-Patman Act. As to buyer fraud, Judge Zirpoli relied on the *Cement* decision and the Supreme Court's confirmation of the *Cement* rationale in *Container*. As to Robinson-Patman compliance, Judge Zirpoli reasoned that it too was a "lawful purpose" for exchanges of price information and that attempted compliance in good faith with one federal antitrust law cannot lead to the violation of another (326 F. Supp. at 312-315). Judge Zirpoli held that the presence of these purposes for gypsum industry verification produced "controlling circumstances" which had been "absent from *Container*."

In *Webster v. Sinclair Refining Company*, 338 F. Supp. 248 (S. D. Ala. 1971), the district court found direct verification between competitors to be lawful, citing *Wall Products*, and *Container*:

> ". . . Such verification is not in violation of 15 U. S. C. A. § 1 if there is present a 'controlling circumstance' as required by *United States v. Container*

> *Corporation*, ... The lawful purpose of meeting competition in good faith as required by the Robinson-Patman Act is clearly present here and constitutes a 'controlling circumstance' as required by *Container, supra*" (338 F. Supp. at 251-52).

Like *Belliston*, the *Gray, Wall Products*, and *Webster* cases were civil Sherman Act cases. Their rationale applies *a fortiori* in a criminal prosecution under the same statute.

B. The Verification Issue Should Never Have Been Submitted to the Jury.

Under the holdings of the foregoing cases, the evidence regarding defendants' verification was patently insufficient to be used as a predicate for finding a Sherman Act violation. The prosecution was required to prove beyond a reasonable doubt that defendants had engaged in verification (a) for unlawful purposes, that is, for reasons *excluding* either Robinson-Patman Act compliance or avoidance of customer fraud, (b) pursuant to an agreement extending into the statutory period after December 27, 1968, and (c) which had a stabilizing effect on prices. The prosecution's burden was not met, and the verification issue should not have been submitted to the jury.[28]

Lawful Purposes of Verification. The prosecution itself recognized that, under *Container*, it had the burden to establish, beyond a reasonable doubt "that the purpose of these [verification] exchanges was for reasons other than to ensure compliance with the Robinson-Patman Act" (Gov't. Req. 15c (4158a-4167a); *see also* Bill of Particulars p. 197). But the prosecution's evidence overwhelmingly

28. Def. Req. Final Inst. 26 (4095a), which the trial judge refused to give (3748a-3749a, Tr. 13,758), would have removed the verification issue from the jury's consideration.

demonstrated that verification occurred to assure compliance with the Robinson-Patman Act and to protect against customer misrepresentation. These legitimate purposes—"controlling circumstances" which were "absent" in *Container*—require acquittal on the verification issue as a matter of law. *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied* 408 U. S. 928 (1972).

Virtually every prosecution witness who testified about the purposes of verification established overwhelmingly that those purposes were fraud protection, Robinson-Patman Act compliance, or both. From USG, Bear cited both fraud protection and Robinson-Patman compliance (590a-591a, Tr. 1648-50), while Gimlin mentioned the Robinson-Patman Act (1179a-1182a, Tr. 3587-92). Drafts of USG's 1962 statement of company policy permitting verification expressly referred to the Robinson-Patman Act and the need to comply with it as lawful reasons to contact competitors (2079ex-2086ex, USG 759). From National, Atwell testified that he verified in those situations where he had serious doubt about the veracity of the customer and to protect National against illegal price discrimination (1651a-1653a, Tr. 5988-90).[29] Atwell's testimony was substantiated by contemporaneous documents corroborating his consultations with outside counsel about Robinson-

29. The infrequency with which Atwell verified, when compared to the substantial number of pricing transactions he had to act on, is graphically demonstrated by a survey which he conducted for the year 1965. In that year, when more requests to meet competition were verified with competitors than at any other time—between 0-6 requests per week—his department processed 40,000 requests to meet competitive offers of lower prices and approximately 80% of those requests were approved (1650a-1651a, Tr. 5986-87). Even at six requests a week that year, or 300 times, he would have verified less than 1% of the 32,000 requests which were approved. To the same effect, see the testimony of: Webster of National (1747a-1748a, Tr. 6374); Burch of G-P (Tr. 5336-38); Hill of Celotex (1793a, Tr. 6622); Galvin of USG (2146a-2147a, Tr. 8904-05); and Fisch of Celotex (3037a, Tr. 11,710).

Patman Act compliance (1664a-1666a, Tr. 6084-86). From G-P, Burch verified because he was concerned about the Robinson-Patman Act and to ensure G-P was not misled by customers (1411a-1412a, Tr. 5273); Sikes verified because of G-P's policy to avoid price discrimination (1510a-1512a, Tr. 5645-47); A. L. Meyer pointed to the need to ascertain customer truthfulness (1480a-1481a, Tr. 5532-33); and McCaskill cited both Robinson-Patman compliance and fraud protection (1289a-1290a, Tr. 4380; 1329a-1331a, Tr. 4647-49). Jarrett of Celotex stated that his company verified to protect against a price discrimination charge (2033a-2034a, Tr. 7473; 2038a, Tr. 7486).[30]

Even the officials of small gypsum producers acknowledged that Robinson-Patman Act compliance and protection from lying customers were the reasons for verification. Van Cleve of Texas Gypsum and Simpson of Republic Gypsum identified both prevention of price discrimination (1847a, Tr. 6860; 1849a, Tr. 6863; 1851a-1853a, Tr. 6880-84; 639a-640a, Tr. 1897) and customer fraud (1850a-1852a, Tr. 6878-80; Tr. 2284-85). Montgomery of Republic Gypsum relied on the need to determine the truth of customer reports of competitive situations (1732a-1734a, Tr. 6314-15). Simpson and Montgomery of Republic,

30. Similarly, Webster, a former employee of National, verified infrequently when he did not have proof that the reported price actually existed (1746a-1748a, Tr. 6372-74). Fredericks, who had no responsibility for gypsum products at G-P after April, 1967 (Tr. 5221-22), testified that although he never verified, he was aware that Sikes verified with the knowledge and approval of corporate counsel (Tr. 5200-01) to be certain that requests to meet competitive pricing were a matter of fact (1400a, Tr. 5204). Goddard of Celotex, who did not verify after August, 1967, testified that on many occasions he received legal advice concerning the scope and application of the Robinson-Patman Act and the requirements of that Act with respect to not discriminating between different customers (1823a-1824a, Tr. 6800-01). Hill of Celotex was advised by company counsel that verification was legally permissible (1793a-1795a, Tr. 6622-24).

who were complaining witnesses for the prosecution, were neither defendants nor alleged co-conspirators despite their own verification. Simply put, all of these prosecution witnesses proved the lawful character of defendants' verification.

Similarly, the defense witnesses, including each of the individual defendants, confirmed the legitimate purposes for defendants' verification, citing the reasons of Robinson-Patman compliance or fraud protection, or both.[31]

The evidence tendered by the prosecution and confirmed by the defense did not, as in *Container*, show absence of a "controlling circumstance."[32] Quite the contrary, it showed the unreliability of customers' claims of lower competitive offers and, further, that when defendants verified they were, in compliance with *Staley* and *Viviano*, attempting to confirm customers' claims for which adequate substantiation was not otherwise available. This glaring deficiency in the government's case pertains to defendants' verification in both the pre-statutory and the statutory periods, alike. As to either period, under *Belliston* and the other post-*Container* decisions, the verification issue should not have been submitted to the jury.

31. See the testimony of Galvin of USG (2145a-2147a, Tr. 8903-05); Hayes of National (2551a-2552a, Tr. 10,374); Thompson (2977a-2987a, Tr. 11,528-42) and Fisch of Celotex (3032a-3036a, Tr. 11,704-08) and the individual defendants: Watt (3234a-3235a, Tr. 12,680-81); Nicely (3402a-3403a, Tr. 13,028); and Brown (3564a-3565a, Tr. 13,267-68).

32. The prosecution emphasized a few competitive contacts—all in the pre-statutory period—regarding specific pricing situations. These were not shown to be "verifications," except one which was described as such by a prosecution witness (1245a-1246a, Tr. 3905; 376ex-381ex, GX 371). Even assuming one or more of these few contacts were "verifications," they were far too limited in time, locale and scope to permit an inference that verification contacts generally, and especially the few in the statutory period, were for other than legitimate purposes.

No Agreement To Verify After 1968. The prosecution also failed to establish any basis for an inference that defendants had even an implied agreement to verify within the statutory period. The uncontradicted evidence establishes that this essential element is lacking since each defendant followed a different course with respect to verification in the period after December 27, 1968.

USG stopped all verification on gypsum products in the late spring of 1968, months before the commencement of the statutory period. Andrew Watt testified that in the spring of 1968, Baldwin recommended to Watt that changed market conditions and competitive strategies made verification unnecessary and that for business reasons it be stopped on gypsum products (3238a-3239a, Tr. 12,686-87). After consultation with counsel, that recommendation was adopted (3239a-3240a, Tr. 12,687-88). Watt's testimony was confirmed by a principal government witness, Rhyne Simpson, Jr., former president of Republic Gypsum.[33] Simpson testified that Watt informed him that USG was no longer verifying prices with anyone (861a-862a, Tr. 2423) and placed his conversation with Watt in the Spring of 1967, when Mr. Montgomery began verifying at Republic (678a, Tr. 1966; 856a-857a, Tr. 2416).[34] Following *Container* and after conferring with counsel,

33. Baldwin's testimony confirmed that Watt approved discontinuing verification (2056a-2057a, Tr. 8170-71) and that Baldwin stopped verifying himself in the Spring of 1968 (2052a-2053a, Tr. 8162-63). Watt's testimony was further confirmed by the testimony of R. L. Wallace, who in succeeding Baldwin as USG's Director of Marketing Policy in November, 1968 (2097a, Tr. 8470-71), had never made or received a verification call (2099a, Tr. 8479-80).

34. Montgomery testified for the prosecution that although he verified beginning possibly in 1967, he *never* verified with anyone from USG (1722a, Tr. 6288; 1723a, Tr. 6290; 1732a-1733a, Tr. 6314, emphasis added).

Watt issued a memorandum directing that verification be stopped on all other USG products (3241a-3244a, Tr. 12,691-93; 96ex, GX 23). Thus, the prosecution's own evidence establishes that by the spring of 1968, USG (the largest wallboard producer) had entirely ceased verification on gypsum products. There is no contrary evidence.[35]

As for National (the next largest wallboard producer), the uncontradicted evidence shows that National stopped verifying immediately upon learning of the *Container* decision in January, 1969,[36] with three limited and unauthorized exceptions:

> (1) Webster, a former National employee called as a prosecution witness, confirmed that on advice of counsel National ceased verifying immediately after *Container* was decided in January, 1969. He stated that, on his own and without authorization, he had a few price verification contacts with Flintkote during the latter part of 1969. He had assumed verification calls could be resumed because he received a call from Flintkote. By the end of 1969 he had ceased entirely, as directed by his superior (1747a-1750a, Tr. 6374-76; 1751a-1752a, Tr. 6392-96).
>
> (2) Max Montgomery of Republic, a single-plant producer, testified that he verified prices with Atwell of National in the statutory period (1722a, Tr. 6288), but only occasionally and only when he was not sure

35. One document suggests that in February, 1971 Celotex initiated a single verification call to an unidentified person in USG's Credit Department pertaining to a credit term to a specific account (1102ex-1104ex, GX 1009). With the exception of this one lawful but unauthorized response, there is no evidence that USG's 1968 decision not to verify was ever violated.

36. See the testimony of witnesses Atwell (1522a-1523a, Tr. 5674; 1638a-1639a, Tr. 6072); Kroth (1720a, Tr. 6280); Webster (1748a-1749a, Tr. 6375); Hayes (2350a-2351a, Tr. 10,371); Kent (2415a, Tr. 9876); and Nicely (3410a-3413a, Tr. 13,039-42).

he was being told the truth by the customer as to prices which the customer claimed had already been quoted by a competitor (1726a, Tr. 6304; 1733a-1734a, Tr. 6315).[37] Atwell denied participation in any verification contacts after counsel advised him to stop in January of 1969 (1522a-1523a, Tr. 5673-74; 1658a-1659a, Tr. 6071-72).

(3) Jarrett of Celotex testified that he made one verification call to someone at National in February, 1971 concerning credit terms to a specific account (2024a-2025a, Tr. 7429-30; 1117ex, GX 1017).

With these limited exceptions, the record discloses that National did not verify at all after *Container* was decided.[38] Such evidence can hardly support findings that, in the statutory period, National was party to an agreement to verify or that the limited, unauthorized verifications which did occur were for purposes other than compliance with the Robinson-Patman Act and prevention of customer fraud.

The evidence regarding G-P's verification contacts in the statutory period is similarly insufficient to show its alleged participation in an agreement to verify. Its verification contacts during those 5 years were minimal. When Eugene Burch became G-P's general sales manager (1285a-

37. In any event, Montgomery's testimony could not serve to link National or any other defendant to any conspiracy. Neither Montgomery nor Republic was named as a co-conspirator; rather, it was the prosecution's contention that Republic was the target of alleged conspiratorial activity, not a participant in it.

38. If one were to adopt the trial court's mistaken view of *Container* as bringing about a fundamental change in existing law, then the evidence of pre-*Container* verification should neither have been received nor submitted to the jury. Such a drastic change in existing law may not be given retroactive application, as shown *infra* at 58, n. 52, and as explained more fully in the separate brief of appellant J. P. Nicely.

1288a, Tr. 4366-69; 1479a-1480a, Tr. 5531-32), he verified a total of 10 or 12 times from June of 1969 to early 1972 (1426a-1427a, Tr. 5336-39). None of these verification contacts was with USG or National, the number one and two companies in the industry (Tr. 5260-62). Max Montgomery of Republic testified that he made possibly four calls to Burch, that Burch never called him, and that he (Montgomery) ceased calling Burch because Burch was not able to answer his questions (1734a-1735a, Tr. 6319-20). Rhyne Simpson of Republic testified that by 1968 he did not verify with G-P because it was obvious that they were dropping prices (831a, Tr. 2315). Fisch of Celotex was advised that it was useless to attempt to verify with G-P because the distribution center managers were autonomous and had control of pricing (3037a, Tr. 11,710). The only evidence of any additional verification contacts by G-P in the statutory period pertained to two possible credit verification calls by G-P to Kaiser and, by inference, one to Johns-Manville in January, 1970 (1285ex-1287ex, GX 1385-1387).[39] The few G-P verifications during the statutory period—none with either of the two leading producers—cannot support any allegation that, as part of a national conspiracy, it participated in any agreement to verify—much less a nationwide price-fixing agreement.

With respect to Celotex (the smallest of the defendant manufacturers) Fisch, an assistant product manager, testified that during the more than four years from August, 1969 to November, 1973, while he acted on many thousands of requests by Celotex salesmen to meet price competition, he initiated "maybe" six verification calls and

39. Mr. Sikes, who had participated in verification calls, left G-P in March, 1967 (1493a-1494a, Tr. 5610-11). Mr. A. L. Meyer, who had done some pre-statutory period verification but was not active with regard to the gypsum business after February, 1969, left G-P in July, 1969 (1477a-1478a, Tr. 5529). He testified that he did not recall making or receiving any verification calls in 1969, before he left G-P (1479a-1480a, Tr. 5531-32).

received "maybe" seven or eight calls, all involving Grand Rapids and Flintkote (3037a-3039a, Tr. 11,710-12). He also testified that Donald Miller, Fisch's superior, who died in 1973, made about one verification call per month during the 1969-73 period (3038a-3039a, Tr. 11,712). Jarrett, Celotex' credit manager, testified that he verified until sometime in 1971 when he stopped based on a discussion with counsel (2012a-2014a, Tr. 7413-14). The evidence is undisputed that Celotex' decision to continue its limited verification in the statutory period resulted from the advice of its counsel as to the scope of *Container* and the verification requirements of the Robinson-Patman Act (2984a-2987a, Tr. 11,538-42). No evidence was adduced from which it may be inferred that Celotex verified because it had an agreement with its competitors to do so, particularly in light of the evidence that its major competitors were refusing to verify with Celotex.[40]

The scarcity of the sporadic verification contacts in the statutory period, combined with the divergent courses followed by each defendant based on advice of its counsel,[41] preclude an inference of agreement to verify within the statutory period. Unlike *Container*, there was no agreement "to furnish price information whenever requested" (393 U. S. at 335). Nor was there a "conscious commitment to a common scheme" required in proving an antitrust conspiracy. *See Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3rd Cir. 1963).

40. There was no evidence that the three individual defendants verified in the statutory period. Colon Brown and Jay Nicely never verified at all (3565a-3566a, Tr. 13,268; 3397a-3398a, Tr. 13,022); Andrew Watt stopped verifying in the fall of 1967 (3234a-3236a, Tr. 12,680-83).

41. As noted *infra* at 60-62, the adherence of the defendants to the differing views of their respective counsel shows that verification was not pursued because of any supposed agreement but because defendants were striving to comply with the intricacies of antitrust law by careful compliance with advice of counsel.

Absence of a Stabilizing Effect. The uncontradicted economic evidence established a chaotic pricing structure throughout the statutory period with widespread and diversified discounting off published list prices in all markets. (See *supra* at 9-17). The few verification contacts occurring in the statutory period[42] could not by any stretch of the imagination be considered as having a "stabilizing effect" on market prices when compared to the hundreds of thousands of transactions which occurred annually, including tens of thousands of authorized price reductions.[43] With the largest producer having already halted all verification by the beginning of the statutory period and the second largest producer stopping (except as noted) within less than a month thereafter, it is inconceivable that the infrequent verification contacts of others could have had anything more than a *de minimis* effect on price levels. As to this element also, the prosecution failed to prove by substantial evidence, as in *Container*, that the "exchange of price information has had an anticompetitive effect . . ." (393 U. S. at 337).[44]

42. For example, USG verified none of the more than 45,000 authorized price reductions in the statutory period (*See* 1986ex-1989ex, USG 301-304).

43. *See* 1986ex-1989ex, USG 301-304; 2152ex-2154ex, NG 349-354.

44. For the pre-statutory period, the prosecution engaged in semantic games by asking witnesses whether in their opinions, unqualified by any study, verification produced a stabilizing effect. One prosecution witness answered negatively (Tr. 1504). Another prosecution witness answered affirmatively (1120a-1121a, Tr. 3343) and also testified that where verification disclosed the falsity of the customer's reported claim, he could not lawfully lower the price (1179a-1181a, Tr. 3587-91). Other prosecution witnesses testified that where verification disclosed the customer to be truthful, the seller was then permitted to grant a lower price (*See* 1179a-1181a, Tr. 3587-91; 1511a-1512a, Tr. 5647; 1851a-1854a, Tr. 6880-82). It is recognized that the Robinson-Patman Act itself has a stabilizing effect on prices by prohibiting discriminatorily low prices and allowing sellers to "meet, not beat" competition. *See* Prepared Remarks of Jonathan C. Rose, Acting Deputy Ass't Atty Gen'l, Antitrust Division, before the Legal Committee of the

Since the prosecution failed to satisfy its burden of proof in challenging defendants' verification, that issue should have been withdrawn from the jury. Instead, the trial court submitted it under instructions which, ignoring the evidence and the controlling authorities, created an irrebuttable legal presumption and in effect directed a verdict against the defendants.

C. The Trial Court's Instructions to the Jury on the Verification Issue Were Erroneous and Prejudicial.

Prior to trial, the court betrayed its fundamental confusion of the controlling law by referring to a supposed "dichotomy" between the *Container* and *Wall Products* decisions (383 F. Supp. at 466-67 n. 5). Actually, those decisions harmonize and create no dichotomy. *Container* expressly recognized that exchanges of price information may have a stabilizing effect on prices but still be lawful where there is some "controlling circumstance," such as protection of legal rights against customer fraud, as in *Cement*, or Robinson-Patman Act compliance, as in *Wall Products*. The trial court's mistaken view that *Container* and *Wall Products* are contradictory led to its hostile rejection during trial and in its final charge of the defense position that verification is lawful under such "controlling circumstance[s]."

1. The Trial Court Prejudicially Mishandled the Verification Issue During Trial.

Despite its pretrial recognition of the signal importance of the verification issue, the trial court rejected

44. (Cont'd.)
Grocery Manufacturers of America, p. 19 (Oct. 29, 1975) (reported in part CCH Trade Reg. Rep. ¶202, Nov. 11, 1975, pp. 5-7). Verification obviously permitted the defendants lawfully to quote figures below those which would have been charged absent verification.

defense requests for a preliminary charge on the Robinson-Patman Act requirements necessary to balance its preliminary explanation of the prosecution's contentions (Tr. 153-54, 157; 18a, Def. Req. Prel. Inst. 18, Docket Entry #160). Only after each defense counsel had adverted to the Robinson-Patman Act in his opening statement did the trial court give a cursory summation of the Act, prefaced with the undermining comment, "That Act, *insofar as it now appears to me to have any relevancy to the matter before you*, provides . . ." (294a-295a, Tr. 407-08, emphasis supplied). Thereafter, during the trial, the court threatened to receive inadmissible prosecution evidence if just one defense counsel referred to the Robinson-Patman Act (Tr. 1040-44). And, the court informed counsel that, in his view, a good faith effort to comply with the Robinson-Patman Act would violate the Sherman Act if verification were shown to have a stabilizing effect on prices (3930a-3932a, Tr. 14,923-25; *See also* Tr. 6041-43; Tr. 7763).

The court's contempt for defendants' legal position was even expressed to the jury during trial. One especially damaging comment by the trial court came during the testimony of Van Cleve of Texas Gypsum, a prosecution witness. Before Van Cleve testified, at least seven prosecution witnesses had testified that they made their telephone verifications to "meet competition" in compliance with the Robinson-Patman Act or to prevent buyer fraud, or both.[45] On direct examination, Van Cleve testified that his superior, Mr. Armstrong, telephoned competitors,

> "in an attempt to verify competitive information that we had picked up in the field and in order for us to

45. See the testimony of witnesses Bear (590a-591a, Tr. 1648-50); Simpson (639a-640a, Tr. 1897; 817a-818a, Tr. 2284-85); Gimlin 1179a-1182a, Tr. 3587-92); McCaskill (1289a, Tr. 4380; 1329a-1331a, Tr. 4647-49); Burch (1411a-1412a, Tr. 5273); Sikes (1510-1512a, Tr. 5645-47; Atwell (1651a-1653a, Tr. 5988-90).

fully determine if this was fact or . . . a false report" (1839a-1840a, Tr. 6849).

On cross-examination, Van Cleve testified that customers "quite frequently" gave misleading or unreliable information, and that verification calls were made to verify such reports in accordance with the requirements of the Robinson-Patman Act (1851a-1854a, Tr. 6880-82). This testimony was important to the defense since Van Cleve was not an alleged co-conspirator and as an employee of Texas Gypsum, was hostile to defendants. However, this witness' strong corroboration of defendants' position was utterly destroyed by the trial judge in a colloquy immediately following:

> "Q. Mr. Van Cleve, wasn't it your understanding that, under these certain circumstances which you have described, these calls to verify prices with competitors by Mr. Armstrong would, under the law, allow you to drop your price to meet that lower competitive quote?
>
> "MR. FRICANO: Objection. It is also repetition.
>
> "THE COURT: Well, you can say whether or not that's your impression.
>
> "I read the Robinson-Patman Act to the jury and *it doesn't say anything about any telephone calls, but go ahead*" (1854a-1855a, Tr. 6883, emphasis added).

The court's mocking statement that the literal statutory language of Section 2(b) of the Robinson-Patman Act does not mention "telephone calls" was grossly misleading, particularly in light of cases such as this Court's decision in *Viviano* interpreting the requirements of the

"meeting competition" defense.[46] With one sarcastic remark, the trial judge bolstered the prosecution's case, impaired the credibility of testimony favorable to the defense, and prejudiced the jury's view of all future testimony about the legitimate reasons for defendants' price verification telephone calls.

2. The Final Charge Erroneously Equated the Purpose of Defendants' Verification With Its Effect and Improperly Instructed the Jury to Presume That the Verification Was for an Unlawful Purpose.

Once the court had determined, contrary to defendants' requests, to submit the verification issue to the jury, defendants were entitled to clear and correct instructions as to the significance of the evidence.[47] Defendants submitted sound instructions on this key issue (Def. Req. Final Instr. 20 (4090a), 26-33 (4095a-4100a) and Def. Supp. Req. 15-21 (4212a-4214a)) which the court either refused, summarily, or failed to charge (3748a, Tr. 13,758; 3787a-3792a, Tr. 14,007-14). In fact, defendants' requests included the precise verification instruction approved by

---

46. If sarcasm rather than substance were the stuff out of which justice is fashioned, the court might as well have instructed the jury that the Sherman Act makes no mention of "telephone calls."

47. A criminal defendant is entitled to specific instructions on his theory of defense if there is evidence to support it and proper requests to charge are made. *United States v. Grimes*, 413 F. 2d 1376, 1378 (7th Cir. 1969); *United States v. Young*, 464 F. 2d 160, 164 (5th Cir. 1972); *Salley v. United States*, 353 F. 2d 897, 898 (D. C. Cir. 1965); 2 Wright, *Federal Practice and Procedure* § 482, p. 279 (1969). The failure to so charge is reversible error, *United States v. Leach*, 427 F. 2d 1107, 1112 (1st Cir. 1970), *cert. denied*, 400 U. S. 829 (1970), because, "[i]n effect, the trial judge directs a verdict on that issue against the defendant," *Strauss v. United States*, 376 F. 2d 416, 419 (5th Cir. 1967). *See also, United States v. Watson*, 489 F. 2d 504 (3rd Cir. 1973); *United States v. Sawyer*, 210 F. 2d 169 (3rd Cir. 1954).

the Ninth Circuit in *Gray v. Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973), but that instruction was not given (see *infra* at 53-54, n. 49). Instead, apparently without even preparing written instructions (3751a-3752a, Tr. 13,763; 3917a-3918a, Tr. 14,906; 3974a-3978a, Tr. 14,982-85), the judge extemporized his final charge to the jury on the complex verification issue.[48] In doing so, he committed wholesale prejudicial error.

In glaring error, the court instructed the jury that, *regardless of their actual purposes*, defendants must be *presumed*, as a matter of law, to have intended to fix prices if their verification had a stabilizing *effect* on prices.

> "If you decide that, if you decide this [verification] was *merely done* in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, *standing alone*, as establishing an agreement to fix, raise, maintain, and stabilize prices, as charged.
>
> "However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes [sic] as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.
>
> • • •

48. Because no written charge was prepared, the trial court was unable to repeat the key verification instruction when requested by the jury less than an hour after it was given and was forced to admit to the jury "you sort of caught me short. . . . Now, I have notes, but I didn't use that precise language in charging you. So, until the Court Reporter who took the charge has made a transcript of it, there is no way for me to read it" (Tr. 14,984; *see generally* 3974a-3978a, Tr. 14,982-85). The verification instruction was therefore not repeated until the next day (Tr. 15,003-25).

> ". . . If the *effect* of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act *regardless of the specific purpose* that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.
>
> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the *effect* of the exchanges or pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are *presumed, as a matter of law*, to have intended that result" (3884a-3885a, Tr. 14,858-59, emphasis added).

As already shown (see *supra* at 26-48), where the purpose of verification is either to comply with the Robinson-Patman Act or to protect against customer fraud, there is no Sherman Act violation, regardless of whether verification occurred pursuant to an agreement or whether verification had a stabilizing effect on prices. But the jury was never instructed that verification was lawful if done pursuant to a reasonable belief concerning the obligations of the law in meeting competition.[49] Although,

49. The instructions which defendants had submitted, but which the court did not charge, included Supplemental Final Instruction Requested by Defendant Watt Regarding Verification And The Robinson-Patman Act. It was taken directly from and accurately paraphrased the civil instruction in *Gray v. Shell Oil Co.*, where the jury was instructed:

> ". . . Thus, Shell could reasonably conclude that the antitrust laws did require it to know or have reason to believe that a competing supplier had reduced its price to Shell dealers competing with the dealers of the other suppliers.
>
> "If you find that Shell sought the price information pursuant to its reasonable belief of the obligations of the law to

initially, the jury was told that verification *standing alone* would not violate the law if done to comply with the Robinson-Patman Act, the court went on, erroneously equating "effect" with "purpose," to instruct that, regardless of defendants' actual purpose, the jury should find a Sherman Act violation if the effect of their verification was to stabilize prices. But the errors did not end with the instruction that evidence of lawful purpose could be disregarded. Rather, they grew to constitutional proportions.

Incredibly, the trial court concluded its verification charge by telling the jury it is "presumed, as a matter of law" that defendants' purpose in verifying was unlawful if the effect of the verification was to stabilize prices. Both the due process clause and the guarantee of a trial by jury flatly preclude a "presumption of guilt" by presuming a central element of the criminal offense charged. *See Barnes v. United States*, 412 U. S. 837, 843 (1973); *Commonwealth v. DiFrancesco*, 329 A. 2d 204, 207-10 (Pa. 1974); *Commonwealth v. Turner*, 317 A. 2d 298, 299-300 (Pa. 1974). *Cf. In re Winship*, 397 U. S. 358 (1970). Similarly, reliance on an irrebuttable presumption is unconstitutional when its effect is to preclude consideration of evidence establishing a defense in a criminal prosecution. *United States v. Bowen*, 414 F. 2d 1268, 1273 (3rd Cir. 1969). By instructing the jury in this case that defendants are "presumed, as a matter of law" to have intended to stabilize prices, the trial court in essence directed a verdict against defendants on the central issue in this criminal prosecution.

49. (Cont'd.)
provide competition and not to fix prices, then you should find that no violation of the law took place upon which these plaintiffs can recover damages for Shell's seeking to obtain such price information" (*Jones v. Shell Oil Co.*, Civ. No. 47261, (N. D. Cal.), *affirmed sub nom. Gray v. Shell Oil Co., supra*, 469 F. 2d at 747).

Quite apart from constitutional infirmities, the trial court's equation of "effect" with "purpose" collides with *Cement, Container,* and all post-*Container* decisions. Indeed, it even runs counter to the prosecution's requested instructions on this point.[50] In gist, the court's charge instructed the jury to disregard evidence of lawful purpose as irrelevant if it found verification had a stabilizing effect on prices. Its consequence was to make *all* exchanges of price information which may have a stabilizing effect on prices, *per se* price-fixing agreements in violation of long established Supreme Court precedent to the contrary.

Compounding the erroneous instruction that price exchanges which have a stabilizing effect on prices are presumptively for an unlawful purpose, the trial court gave a homely and extremely prejudicial "illustration" of what is meant by a price-fixing agreement. In substance, the illustration told the jury that price-fixing occurs when price information is exchanged:

> "I guess I could sum it up by saying Macy's can't tell Gimbels; but, if Macy's wants to follow Gimbels and charge the same prices Gimbel's do [sic], there is nothing wrong with that, unless there is an agreement to do that (3877a-3878a, Tr. 14,850).

Thus, the jury was told, in effect, "USG can't tell National." Even after vigorous objection, the trial court refused to

50. Gov't Req. 15c (4158a-4167a) read, in pertinent part:
"However, if you find *that the purpose of these exchanges was for reasons other than to ensure compliance with the Robinson-Patman Act*, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to maintain or stabilize prices."
The second paragraph of the portion of the court's charge quoted at page 52 above virtually tracks the government's request, except for the key words. In place of the prosecution's words, which we have italicized, the court completely changed the meaning by substituting
"that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard."

explain the lawful circumstances under which "Macy's *can* tell Gimbel's." [51]

The errors in the court's verification charge were promptly challenged by defense objection (3915a-3917a, Tr. 14,902-905; 3924a-3925a, Tr. 14,914-915; 3928a-3930a, Tr. 14,920-921; 3930a-3932a, Tr. 14,923-925), but these objections were brusquely turned aside by the trial court, with an unseemly threat to compound its error and an invitation to seek the review of this Court:

> "MR. MCSWEENEY [Celotex Counsel]: . . . And in that connection I also object to the charging in that it said if the effect of verification was stabilization, then there can be conspiracy regardless of the purpose of the verification; whereas the law is that if the purpose is compliance with the Robinson-Patman Act, even if that should bring about an effect of stabilization, it is not illegal.
>
> "THE COURT: That is not, so far as I am concerned, the law at all, and I am not going to charge that way. In other words, I think if it violates both sections, if it is done for the purpose of a defense to Robinson-Patman but it violates the other section, that's a violation of the law. I didn't charge that way. I will if you wish.
>
> "MR. MCSWEENEY: No. Of course, I would not want that, because I don't consider that the law.
>
> "THE COURT: Now when you raise that kind of thing I tried to avoid saying that. But if you wish, I will say it.

51. This careless instruction given without prior notice emphasizes the error invited by the trial court in refusing to prepare a written charge and in extemporizing in a case of this length and complexity.

> "MR. MCSWEENEY: Well, Your Honor, I certainly do not wish that.
>
> "THE COURT: Well, you say I am wrong the way I said it. Now if you want me to, I will say it exactly the way I think is right. I tried to avoid making that kind of harsh statement, but I will say it if you want me to.
>
> "MR. MCSWEENEY: I do not want you to say that.
>
> "THE COURT: You are raising it; aren't you?
>
> "MR. MCSWEENEY: I don't want you to say it, Your Honor. I say what I think the law is. I think the law is quite the contrary. We apparently have a difference of view of the law.
>
> "THE COURT: We sure do.
>
> "MR. MCSWEENEY: Yes, we do.
>
> "THE COURT: That's all right. There is nothing wrong with that. You can disagree with me.
>
> "MR. MCSWEENEY: But Your Honor shouldn't be . . .
>
> "THE COURT: I am merely saying that if you want me to state my thoughts on the matter quite clearly, so that a reviewing authority can review it if they want to, I will do it. My thoughts are that if it violates the Sherman Act, even though it is done for some other purpose . . .
>
> "MR. MCSWEENEY: I don't want to provoke Your Honor into giving an instruction which I consider wrong. I would consider if you did that it would be error.

"THE COURT: You consider the way I do it error, too" (3930a-3932a, Tr. 14,923-25).

The trial court's adamance that good faith compliance with one antitrust law can violate another plainly led to its faulty charge on the principal issue in the case.[52] Clear error of extraordinarily prejudicial character was committed requiring vacation of the judgments below.

3. The Trial Court Did Not Adequately Instruct the Jury Concerning Defendants' Right to Protect Themselves Against Customer Fraud.

The trial court's final instructions omitted any reference to verification being lawful if done to protect against customer fraud. *See Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588 (1925). Thus, despite defendants' requested instructions,[53] the extemporaneous delivery of the charge resulted in a central element of the defense being simply forgotten by the trial court.

When this significant omission was called to the court's attention, after the charge had been completed (3930a-3931a, Tr. 14,923), the court did not correct the

52. Even if the trial court felt *Container* changed the law of *Cement*, defendants were entitled to an instruction that pre-*Container* evidence of verification could not be considered against any defendant. Two such instructions were tendered but refused (4187a, Watt Supp. Req.; 4195a, National Supp. Req.). Such a fundamental change of law, had the change occurred, clearly would have to be limited to prospective application only. *See Bouie v. City of Columbia*, 378 U. S. 347, 352-54 (1964); *United States ex rel. Clark v. Anderson*, 502 F. 2d 1080, 1083 (3rd Cir. 1974). This principle is discussed more fully in the separate brief of appellant J. P. Nicely.

53. See Def. Req. Final Inst. 29 (4097a-4098a) and Def. Supp. Req. 16 (4212a) and 19 (4213a), the last of which read:

> "Sellers may lawfully contact competitors to confirm or verify a report of a lower price or price quotation to a customer even if the effect of such contacts is to stabilize or increase prices provided the purpose of such contacts is to protect sellers against misrepresentations of the customers as to the prices they are being quoted or charged."

omission by charging, as requested, that verification was lawful if its purpose was to protect against customer misrepresenation. Instead, it limited its "correction" to an inadequate description of the "contentions" of defendants:

> "I want to say that in connection with verification either as to job protection arrangements or price, the Defendants contended there were two purposes, not just one. One purpose they contended for was that it was a defense to the Robinson-Patman Act. The other they contended was to avoid being defrauded. If they had any other contentions you heard them set forth by counsel. If counsel told you what their contentions are and they differed in any way from mine, they know what their contentions are better than I know what their contentions are, so you take their statements of the contentions" (3946a, Tr. 14,944).

Thus, the trial court passed off a fifty-year old principle of the Sherman Act, set down in *Cement*, as a mere lawyer's argument, to be given such weight as the jury desired without any guidance whatsoever.[54] The trial court's failure to instruct the jury properly on the relevance of the customer fraud defense was prejudicial error on the key issue of verification.[55]

54. The jury had, of course, been told time and again by both court and counsel that it could "take the law" only from the judge, *not* from counsel (294a-295a, Tr. 408; 3834a-3835a, Tr. 14,819). Without guidance from the court on the significance of defendants' contention, the jury may well have fallen prey to the prosecutor's erroneous assertion, in his closing argument, that "[t]here cannot be fraud if there is not a legally binding contract" (3848a, Tr. 14,790). The trial court refused to give a requested instruction which would have corrected the prosecution's improper assertion (4217a, G-P Supp. Req. [Rebuttal] A).

55. Similarly, although the trial court had instructed the jury that an exchange of job price protection lists was lawful if done to prevent customer fraud (3879a-3881a, Tr. 14,852-53), that instruction was also prejudicially erroneous primarily because the court also instructed the jury that exchanges of job protection lists could

4. The Trial Court Improperly Refused to Allow the Jury to Consider the Relevance of Legal Advice to Defendants That Verification Was Lawful.

Abundant evidence showed that defendants engaged in verification because different legal counsel advised each of them separately that verification was legally permissible.[56] This evidence was not offered with the thought that legal advice could immunize an otherwise unlawful agreement. Instead, the issue of legal advice had a dual relevance: it established, first, that defendants' purpose in verifying was to comply with the Robinson-Patman Act and, second, that defendants engaged in verification *not* because they had agreed to do so with competitors but because they desired to comply with the law and to heed their respective counsels' advice.[57] This position was buttressed further by the uncontradicted evidence that USG stopped verifying after consulting its counsel in 1968, while National did so early in 1969 on advice of its counsel (see *supra* at 42-44). Following a different course, Celotex continued its infrequent verifications after 1969 because its counsel advised that it was lawful to verify in order to avoid Robinson-Patman Act liability (see *supra* at 46).

55. (Cont'd.)
provide a basis for inferring that a price fixing conspiracy existed in the statutory period when there was no evidence that any defendant even kept such lists, much less exchanged them after 1967 (3877a-3878a, Tr. 14,849-50; 3879-3881a, Tr. 14,852-53).

56. For example, Atwell of National testified he had frequently consulted "with outside counsel about what [he was] doing in order to try to comply with the Robinson-Patman Act" (1664a, Tr. 6084). There was, as the court explained, "written corroboration . . . of the consultation between National Gypsum and their counsel concerning the Robinson-Patman Act" (1664a-1666a, Tr. 6085-86). National's antitrust compliance manual, prepared with the aid of counsel, made express reference to the Robinson-Patman Act and authorized verification with competitors where further confirmation of customers' claims was needed (1898a-1901a, Tr. 7026-28; 2133ex-2146ex, NG 77 p. 6). There was similar evidence as to other defendants. As to USG, see USG 63, USG 660; 538a, Tr. 1466; 1179a-1180a, Tr. 3587-88. As to G-P, see 1289a-1290a, Tr. 4389; Tr. 5201; Tr. 5258-59. As to Celotex, see 1794a-1797a, Tr. 6623-27; 3032a-3035a, Tr. 11,703-07; 2977a-2980a, Tr. 11,528-32. As to Watt, see 3235a, Tr. 12,680-81. As to Nicely, see 3402a-3403a, Tr. 13,028.

57. In addition to seeking proper instructions on the relevance of legal advice to show a lawful reason for verifying (4082a-4083a, Def. Req. Final Inst. 9), defendants requested the following charge on legal advice:

> "A person is entitled and encouraged to seek and rely upon the advice of counsel in guiding his business conduct. While the fact that counsel may have approved certain conduct as lawful does not constitute a defense to a Sherman Act violation if the conspiracy charged is found from the evidence, a defendant who pursues a course of conduct because he understands it to be lawful based upon the advice of counsel, and who does not understand that he had committed himself to other alleged co-conspirators to pursue that course of conduct pursuant to a common scheme, is not a conspirator and has not violated the law by engaging in that course of conduct." (4208a, Def. Supp. Req. 7)

The trial court refused to instruct the jury as to either aspect of the relevance of defendants' evidence of legal advice (3748a-3749a, Tr. 13,758; 3782a-3783a, Tr. 14,001). Instead, the court merely instructed that:

> "I also want to remind you that we are concerned, here, with the Sherman Act, with an antitrust violation. The fact any particular company's antitrust policies may or may not have been violated *or legal counsel may or may not have advised their company that a particular action was or was not a violation of the antitrust laws have relevance only insofar as it bears on the alleged violation of the Sherman Act, which is your concern*" (3903a, Tr. 14,885, emphasis added).

Thus the court completely and prejudicially ignored the consideration that verification pursued upon independent

legal advice was relevant both to the jury's assessment of the legitimate purpose of verification and the absence of any implied agreement or "conscious commitment" to one's competitors to verify. *See Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3rd Cir. 1963); *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963).

These multiple errors in the trial court's charge concerning the verification issue precluded a fair trial. While they unquestionably require reversal of the judgments below, their significance is not limited to this case. They reflect an unconscionable interpretation of the nation's antitrust laws which place businessmen striving to comply with all the laws in the intolerable dilemma of having to choose which antitrust law to violate. That interpretation, encouraged by the prosecution and expressed repeatedly by the trial court, was the fundamentally unfair and erroneous basis on which the prosecution's case was submitted to the jury.

D. The Policy of the Nation's Antitrust Laws Is Not Served by a Statutory Construction That Holds Compliance With One Law to be a Violation of Another.

The prosecution's attack on defendants' verification in this case cannot be separated from the public efforts of the Antitrust Division to repeal the Robinson-Patman Act as, in the words of the chief prosecutor, "antithetical" to the Sherman Act (see *supra* at 27). Current Administration spokesmen have called for repeal of the Robinson-Patman Act as an "expensive piece of antiquity" that "promotes

stabilization of prices charged by sellers." [58] Others have directly attacked the Robinson-Patman Act as anticompetitive.[59] President Ford has called for changes in the Robinson-Patman Act, which he termed a "leading example" of "laws which restrain competition" by discouraging "both large and small firms from cutting prices." [60]

This prosecution was conceived and tried by the Antitrust Division as though the Robinson-Patman Act had already been repealed. As the Antitrust Division knew, in civil litigation in this industry (*DiMarco, et al. v. USG et al.*, E. D. Pa., CA #31766) USG's and National's answers to interrogatories, filed in 1965, described their verification for the purpose of compliance with the Robinson-Patman Act (Ev. H. DX Q-4-6). Additionally, USG justified its verification as a protection against customer misstatement (Ev. H. DX Q-5). Judge Zirpoli's 1971 adjudication in *Wall Products* found that the gypsum companies' purpose in verifying was both to comply with the Robinson-Patman Act and to protect against customer misrepresentation. Only after the *Wall Products* litigation was settled and an appeal was thus precluded, did the prosecution file this belated challenge to defendants' verification.

Disingenuously ignoring this extensive testimony of defendants' concern over the Robinson-Patman Act and closing its eyes to internal contemporaneous documentation [61] of that concern, the prosecution embarked on this

58. Jonathan C. Rose, *id.* at CCH Trade Reg. Rep., #202, Nov. 11, 1975, pp. 5-7.

59. Testimony of Joe Sims, Special Ass't to the Ass't Atty. Gen'l, Antitrust Division, before House Comm. on Small Business, Subcommittee on Activities of Regulatory Agencies, p. 14 (July 10, 1975).

60. Remarks of the President, 63rd Annual Meeting of the U. S. Chamber of Commerce (April 28, 1975, p. 8).

61. See *supra* at 60, n. 56.

criminal challenge to Robinson-Patman Act verification. Disregarding the truth, the prosecution urged in its closing jury argument that the "Robinson-Patman Act defense" was "a sham conjured up for this case" and was "one dreamed up for this lawsuit" (Tr. 14,698; Tr. 13,850).

This prosecutorial deception was given credence by the mantle of the federal government borne by the prosecutor and the likely assumption by lay jurors that a federal prosecutor would not knowingly prosecute people for actions taken in compliance with federal statutes (see *infra* at 148-150 and *Berger v. United States*, 295 U. S. 78, 88 (1935); *Hall v. United States*, 419 F. 2d 582, 588 (5th Cir. 1969)). The burden borne by defendants in overcoming the prosecution's deception was, therefore, extreme, particularly in view of the inadequacy and one-sidedness of the trial court's verification instructions.

The view adopted by the trial court that compliance with one antitrust law may violate another, makes these defendants sacrificial pawns in a governmental policy battle brought in the arena of a criminal indictment. While the antitrust laws may be a trap for the unwary, the final charge of the trial court makes them a snare for the vigilant. The policy of the federal courts should be to encourage businessmen to seek and rely upon the advice of antitrust counsel. Such good faith reliance was present in this case, consistent with the teachings of this Court in its *Viviano* decision and the Supreme Court in the *Cement* case.

In light of this prosecution, the risks faced by businessmen are not only grave but wholly contrary to the policies of all the antitrust laws. A businessman encountering a doubtful claim by a customer of a lower competitive price dare not verify that report with a competitor lest he be charged with a felony under the Sherman Act. He cannot

meet that lower price without risking agency prosecution and treble damage liability under the Robinson-Patman Act. The least precarious alternative is simply not to lower his price, risk the loss of business, and become non-competitive—the precise result which the Sherman Act and the meeting competition *proviso* of the Robinson-Patman Act would avoid in the interest of fostering competition and lowering prices.

If there are to be changes in the priorities of antitrust enforcement they must be accomplished fundamentally by congressional action and not by judicial or prosecutorial disregard of one law in favor of another. The current head of the Antitrust Division has recently commented that the "mere exchange of price information [pursuant to the Robinson-Patman Act] may tend to stabilize prices" and that if that Act "is not enforced, it ought not to be on the books, for that leads to disrespect for the law."[62] Nothing will contribute more to disrespect for the law than a judicial principle that good faith compliance with one law may be considered evidence of the violation of another law.

In the interests of fundamental fairness and justice, the convictions below must be reversed and acquittals mandated.

---

62. BNA *ATRR* No. 743, p. A-21 (12/16/75).

II. Defendants Are Entitled to Judgments of Acquittal Because the Prosecution's Evidence Consists of a Hodgepodge of Unconnected Episodes That Are Insufficient, Singly or Collectively, to Prove a Nationwide Price-Fixing Conspiracy Within the Statutory Period.

In addition to fundamentally misconceiving the legality of price verification, the trial court failed to recognize the insufficiency of the evidence to establish the charge of a nationwide price-fixing conspiracy continuing from at least 1960 until December 27, 1973. Consequently, the convictions must be reversed and judgments of acquittal entered for all defendants.[63]

Due process requires that there exist "substantial" evidentiary support for each essential element of the offense charged. *In re Winship*, 397 U. S. 358, 364 (1970); *Pauldino v. United States*, 379 F. 2d 170, 172 (10th Cir. 1967). The primary element of a criminal conspiracy that must be proven by substantial evidence is an agreement by the defendants to act together to achieve some unlawful objective. *United States v. Falcone*, 311 U. S. 205, 210 (1940); *United States v. Klein*, 515 F. 2d 751, 753 (3rd Cir. 1975). Proof of such a conspiratorial agreement is fundamental to an alleged violation of Section 1 of the Sherman Act. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537, 540-41 (1954).

In a Section 1 case, there must be substantial evidence of a "consciousness of commitment to a common scheme" by each defendant. *Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3rd Cir. 1963); *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963).

63. Unlike other Sherman Act prosecutions, no witness in this case testified that he had ever agreed with a competitor on prices, terms or conditions of sale or that he participated in or even overheard discussions where such agreements between competitors were made. Contrast *United States v. American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 182 (3rd Cir. 1970). Defendants' past and current employees uniformly denied ever agreeing on prices or terms with a competitor. Contrast *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 218-19 (1939).

And, most importantly for purposes of this appeal, that evidence must establish, beyond a reasonable doubt, that the alleged conspiratorial agreement continued into and existed within the statutory period. In reversing a conspiracy conviction on statute of limitation grounds, the Supreme Court has held that it is "incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence" during the statutory period. *Grunewald v. United States*, 353 U. S. 391, 396 (1957).

This principle is an accepted doctrine of substantive conspiracy law designed to safeguard the protections of the statute of limitations and to circumscribe the vicarious criminal liability which conspiracy law imposes for the acts and statements of others. *Grunewald v. United States*, 353 U. S. at 402. See *United States v. Heinze*, 361 F. Supp. 46, 53-54 (D. Del. 1973); *United States v. Stein*, 249 F. Supp. 873, 875-76 (E. D. Pa. 1966); *United States v. Schneiderman*, 106 F. Supp. 892, 896-97 (S. D. Cal., 1952). Antitrust law also requires that where an alleged conspiracy may have had its origins prior to the statutory period, it must be shown by evidence beyond a reasonable doubt that the conspiracy still existed within the statutory period. *United States v. Kissel*, 218 U. S. 601 (1910); *American Tobacco Co. v. United States*, 147 F. 2d 93, 120 (6th Cir. 1944), *affirmed* 328 U. S. 781 (1946).[64]

64. Even in civil antitrust cases, the plaintiff must prove that the alleged conspiracy continued into the damages period. *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.*, 263 F. 2d 533, 535 (2d Cir. 1959), *cert. denied* 360 U. S. 912 (1959); *Goldlawr, Inc. v. Shubert*, 290 F. Supp. 482, 509-10 (E. D. Pa. 1968).

The prosecution must establish, as to any conspiracy allegedly formed prior to the statutory period, that its purpose and scope contemplated conspiratorial activity continuing into the statutory period, *United States v. Borelli*, 336 F. 2d 376, 385 (2nd Cir. 1964), *cert. denied*, 379 U. S. 960 (1965), and that the defendants in fact consciously participated in such conspiratorial behavior within the statutory period. *United States v. Johnson*, 65 F. Supp. 46, 48 (M. D. Pa. 1946). Moreover, in proving that a pre-statutory conspiracy actually continued into the relevant period, the prosecution must demonstrate a connection, or "connecting links," between the events in the pre-statutory period and those occurring later. *Kotteakos v. United States*, 328 U. S. 750, 773-74 (1946); *United States v. DeCavalcante, supra*, 440 F. 2d at 1273-75. Otherwise, lawful conduct within the statutory period may be used improperly as a basis for conviction because of a suspicion that it is somehow related to the pre-statutory events, when, in fact, the earlier events are not connected to subsequent events in the statutory period. Or, convictions may be secured for one or more localized conspiracies rather than the unitary continuing conspiracy charged in the Indictment, resulting in a fatal variance between the Indictment and proof. See *United States v. Central Supply Ass'n*, 6 F. R. D. 526, 528-33 (N. D. Ohio 1947). Here, no substantial evidence establishes the conspiracy charged either within or without the statutory period.

A. No Antitrust Conspiracy Existed Within the Statutory Period.

At trial, the prosecution urged only four incidents within the statutory period, in addition to limited price verification, as supportive of an inference of a nationwide price-fixing conspiracy. One episode involved parallel announcements of a May, 1969 list price increase. Another

episode concerned initially unsuccessful but eventually parallel decisions to discontinue in December 1970 a prompt-payment discount extended to West Coast customers. The third episode involved decisions by USG's competitors in early 1971, to follow USG's announcement discontinuing its practice of shipping gypsum board on wooden pallets to Michigan-area customers. The fourth and final episode related to lower prices charged by gypsum producers in the Southwest in 1970 where oversupply was acute. The four disparate episodes relied upon by the prosecution are insufficient to support any inference of a conspiracy among defendants in the statutory period, much less the continuing, nationwide price-fixing agreement charged in the Indictment.

The scarcity of verification contacts after 1968, previously discussed, is symptomatic of the sparseness of the prosecution's evidence within the statutory period. The four post-1968 events relied upon by the prosecution consist of isolated examples of parallel business behavior and occasional business contacts between competitors which, as all of the witnesses explained, were for legitimate business reasons—not for any improper purpose. Such evidence would be insufficient even in a civil antitrust case to create a jury issue of conspiracy. *See Venzie Corp. v. U. S. Mineral Products Co.*, 1975–2 Trade Cases, ¶ 60,481 (3rd Cir. 1975).

In considering the insufficiency of the evidence regarding the prosecution's proof within the statutory period, two basic principles of antitrust conspiracy law are controlling. First, in a criminal case, so-called opportunity contacts between alleged conspirators are presumptively innocent. *See United States v. Kompinski*, 373 F. 2d 429, 434 (2nd Cir. 1967); *United States v. Van de Carr*, 343 F. Supp. 993, 1001 (C. D. Cal. 1972). Even in a civil case, opportunities for formation of a conspiracy are "significant

only if other evidence permits an inference that an agreement did in fact exist." *Venzie Corp. v. U. S. Mineral Products Co., supra,* 1973-2 Trade Cases, ¶ 60,481 at 67,135.

The second principle is that parallel pricing decisions, even when made with an awareness of competitors' actions, are insufficient to support an inference of a conspiratorial agreement. Businessmen often react similarly to common economic pressures and marketplace stimuli, and competition itself is likely to force competitors to adopt similar, often identical, prices and policies. Thus, consciously parallel conduct is consistent with independent decision-making and is considered neither surprising nor illegal. *United States v. General Motors Corp.*, 1974–2 Trade Cases ¶ 75,253 (E. D. Mich. 1974) at 97,670-71; *North Carolina v. Chas. Pfizer & Co.*, 1974–2 Trade Cases ¶ 75,178 (E. D. N. C. 1974) at 97,302. This Court, and others, have recently reaffirmed that parallel business actions consistent with each defendant's interests are "meaningless" and preclude any inference of conspiracy. *Venzie Corp. v. U. S. Mineral Products Co., supra,* 1975–2 Trade Cases at 67,136; *Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co.*, 513 F. 2d 102, 111 (2nd Cir. 1975). *See generally Theatre Enterprises, Inc. v. Paramount Film Distrib. Co.*, 346 U. S. 537, 541 (1954); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1961), *cert. denied*, 369 U. S. 839 (1962); *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 746-47 (N. D. Cal. 1959) (citing *Milgram v. Loew's, Inc.*, 192 F. 2d 579, 583 (3rd Cir. 1951), *aff'd*, 322 F. 2d 656 (9th Cir. 1963), *cert. denied*, 375 U. S. 922 (1963).

The decisions holding that neither opportunity contacts nor conscious parallelism will support an inference of conspiracy are specific applications of the basic doctrine

that evidence which supports two inconsistent inferences, one of innocence and one of guilt, has no probative force. Such evidence is patently insufficient in either a civil or criminal case to satisfy the accusing party's burden of proof. *E.g., United States v. Butler*, 494 F. 2d 1246, 1252 (10th Cir. 1974); *United States v. Delay*, 440 F. 2d 566, 568 (7th Cir. 1971); *United States v. Saunders*, 325 F. 2d 840, 843 (6th Cir. 1964), *cert. denied*, 379 U. S. 978 (1965); *Commercial Standard Ins. Co. v. Gordon's Transports, Inc.*, 154 F. 2d 390, 394-95 (6th Cir. 1946) (civil case). Thus, acquittal in a criminal case is required where the evidence itself suggests a reasonable hypothesis of innocence. *See Holland v. United States*, 348 U. S. 121, 135-36 (1954); *United States v. Partin*, 1972 Trade Cases ¶ 73,999 (N. D. Ga. 1972) at 92,163. Otherwise, where the evidence supports competing and inconsistent inferences, the choice of one inference over another would be based only on suspicion, bias, or at most "sophisticated surmise"—none of which affords a sufficient basis for imposing criminal sanctions. *United States v. Bradley*, 421 F. 2d 924, 926 (6th Cir. 1970); *Moore v. United States*, 271 F. 2d 564, 568 (4th Cir. 1959). In this case, an inference of conspiracy within the statutory period could only be the product of suspicion and bias and could not be bottomed on the evidence.

1. The May 1, 1969 List Price Changes.

Initially, the prosecution charged that the defendants agreed on the prices at which they would sell gypsum wallboard to customers (44a-46a, Indictment ¶ 11 & 12; Tr. 188). As uncontradicted evidence demonstrated that actual market prices had dropped sharply in the decade of the 1960's, resulting in all time industry lows during the 1970 housing recession, the prosecution began to back-

pedal.[65] Instead of transaction prices, the prosecution began to focus its arguments on list prices. Although the Indictment and Bill of Particulars charged that all major list price increases within the statutory period were conspiratorial (45a, Indictment ¶ 12c; B. P. 30) by the time of closing arguments, the prosecution argued only that the May, 1969 increase could be regarded as conspiratorial.

The prosecution's failure to attack other list price changes in the statutory period is understandable in view of the undisputed evidence of declining, nonparallel list prices announced both prior to and throughout the statutory period. *First,* list prices for gypsum products declined during the thirteen-year period of the claimed conspiracy. For example, USG's list price for ½" wallboard in Pittsburgh dropped from a high of $49.08/MSF in January, 1962 to a low of $38.00 in October, 1970, and then recovered to $48.00 by 1973—a net drop of $1.08 during the period from 1962 to 1973 (Watt 1). Similarly, National's list price for ½" wallboard in Pittsburgh was $49.60/MSF in 1960 and $49.00 in 1973 (2547a, Tr. 10,366). This occurred during an era of unparalleled price inflation on nearly all consumer goods (3194-3196a, Tr. 12,500-08; USG 656).

Second, the record establishes that there was constant list price "jockeying" before and after the statutory period which could only be explained by the existence of vigorous price competition. From February, 1967 through September, 1973, USG alone made twenty-six major announcements of list price changes, eight of which were decreases.

65. These facts are set forth in the statement of the case (see *supra* at 9-14). In addition, Dr. Cyert's uncontradicted studies and expert opinion confirmed the existence of rampant competition (see supra at 15-17). Moreover, USG reported more than 45,000 authorized price cuts during the statutory period to meet lower competitive prices (Tr. 8929), National authorized almost 35,000 price cuts from 1968-73 to meet competition (2154ex, NG 353 and 354; Tr. 10,089-90), and Celotex authorized 16,795 requests to meet competition (2476ex, CEL 62).

Of these announcements, thirteen had to be postponed, modified in amount, or cancelled altogether due to the varying responses of competitors (1990ex, USG 305).[66]

Third, there was uncontradicted evidence by National's responsible pricing officer that each list price announcement, with which he was principally involved, was made independently in a state of competitive uncertainty over the response of others, thus confirming the absence of a "conscious commitment to a common scheme" to increase prices.[67] The undisputed absence of any pattern of "success" in list price changes strongly corroborated the independence of the decison-making process.

Fourth, G-P exhibits (2235ex-2239ex, G-P 99; 101, 102, 103, and 106) which compare published list prices with actual market prices ("pink sheet prices" are G-P's best assessment of actual market prices) (2880a-2881a, Tr. 11,187) were uncontroverted proof that (1) the market prices charged for ½" gypsum wallboard in the period September, 1968 to the Summer of 1970 were lower than the published list prices; (2) the market prices, as well as the published list prices, decreased during that period; and (3) the market prices were unrelated to G-P's published list prices (2881a-2882a, Tr. 11,187-89; 2924a-2925a, Tr. 11,356-57; 3103a-3104a, Tr. 12,113-14).

66. Of the few announcements which went into effect, a number proved unsuccessful in that heavy discounting continued from pre-increase list prices, thus nullifying any potential benefit from the announcement (see *supra* at 15-17; 2082a-2083a, Tr. 8349-50).

67. J. P. Hayes, who authored all of National's pricing proposals from January, 1968 through 1973, testified without contradiction to the independent evaluation and decisions he made concerning every major price move by National between January, 1968 and the institution of federal price controls in August, 1971 (2532a-2534a, Tr. 10,340-42; 2576a-2593a, Tr. 10,423-54; 2597a-2624a, Tr. 10,459-501; 2632a-2639a, Tr. 10,513-25; 2172ex-2173ex, NG 404; 2177ex-2182ex, NG 422; 2183ex-2213ex, NG 429-432).

No more eloquent testimony of defendants' price competition could have been offered than the complete silence of the prosecution's own economic expert on the issue of conspiracy. Unlike defendants' expert, the prosecution's economist failed to come to *any* conclusion as to whether defendants' conduct was conspiratorial or whether market behavior was indicative of conspiracy. In a criminal case, the inability of the prosecution's own expert to draw even a tentative conclusion of conspiratorial activity in itself raises a reasonable doubt, particularly when the defendants' evidence of rampant competition stands unrebutted.

The arguments of the prosecutor regarding the May, 1969 list price announcements must be evaluated in the context of the substantial, unrebutted record of price competition just prior to and throughout the statutory period. Changes to be effective May 1, 1969 were first announced by USG on January 31, 1969 (1179ex-1181ex, GX 1151-1153). Parallel announcements by competitors followed two weeks or more later (1197ex-1200ex, GX 1176-1179; GX 1184; 1210ex, GX 1188; 1211ex, GX 1189; and 1212ex, GX 1190). The prosecution urged that two possible telephone contacts in early November, 1968 and three internal G-P memoranda were sufficient to support an inference of conspiratorial agreement.

The two possible telephone contacts purportedly occurred on November 6th and 7th between William Hunt, a G-P vice-president, and Graham Morgan, USG's chairman (540ex-542ex, GX 456a-b). Even assuming any conversation occurred, there is no evidence that these men discussed USG's announcement made some three months later. To the contrary, the evidence affirmatively shows that at the time of these alleged calls, Morgan and Hunt were considering a proposal by National Homes that G-P

and USG, along with General-Electric, Owens-Corning and Alcoa, help capitalize a low-income housing venture (USG 695-697).[68] Such evidence is patently insufficient to support an inference of illegality. *See Venzie Corp. v. U. S. Mineral Products Co., supra,* 1975-2 Trade Cases, ¶ 60,481 at 67,134-35.

The three G-P internal memoranda add nothing. The first was a February 4, 1969, memorandum from McCaskill of G-P to his superior, Hunt, advising that G-P had just found out about USG's announcement of January 31st, some five days earlier.[69] Despite the fact that the memorandum was drafted after the public announcement, the prosecution argued that chance phrases in the document

68. USG 697 discloses that F. J. Close of Alcoa was involved in the consideration of the National Homes proposal. When the government's own evidence of an alleged conspiratorial contact (Hunt's calendar entry dated November 7, 1968—"Call Morgan—Close"—541ex-542ex, GX 456b) is read together with USG 695-697, the only fair inference that can be drawn, assuming the calls were actually completed, is that Hunt called both the USG and Alcoa representatives to discuss the housing project.

69. McCaskill's February 4, 1969, memorandum to Hunt (1190ex-1191ex, GX 1163) reads:

> "Hallelujah—you were right, Bill. It's always darkest before the dawn; but sun-up is not till May 1st, damnit.
>
> Nevertheless, USG has a trade announcement out to cover all areas with an increase approximately $5.00 per M—and 2% terms.
>
> Our intent is to follow as fast as we can assimilate, print, and mail.
>
> They are taking the tack of not mentioning trade or competitive discounts and simply raising the list.
>
> I think it is in our best interest to follow precisely along the same line, and no doubt so will every one else.
>
> A sample of their announcement is attached."

Hunt replied that he hoped it would work and that he guessed USG's "guarantee" (which McCaskill explained as job protection previously extended by USG—Tr. 4485) prevented USG from announcing an effective date prior to May 1, 1969. In a previous announcement published to the trade dated November 21, 1968, USG had guaranteed its September, 1968 list prices until May 1, 1969 (G-P 225).

suggested that Hunt had prior notice of the USG announcement (Tr. 13,958-59). The memorandum itself is inconsistent with an inference of a prior agreement between USG and G-P to take similar pricing actions.[70] Significantly, the only witness the prosecution called concerning this increase was McCaskill, who denied that he or Hunt had any prior notice of USG's announcement (1299a-1300a, Tr. 4477-79; 1302a, Tr. 4481). McCaskill explained his phraseology—"you were right, Bill"—as referring to a prior conversation with Hunt in which McCaskill had complained that prices were depressed and the pricing situation was bleak and Hunt had tried to buck up McCaskill by saying "hang in there" (1302a, Tr. 4482), "it's always darkest before the dawn" (1191ex, GX 1163). No fair person could conceivably argue that such innocuous folk expressions constitute evidence of conspiratorial behavior.

The other two G-P memoranda are similarly innocent. One memorandum from a G-P regional manager, dated February 14, 1969, states that competitors were "following" USG's announcement (1192ex, GX 1164). On the day that memorandum was written, two competitors had publicly announced that they also had decided to increase list prices on May 1, 1969 (1197ex-1200ex, GX 1176-1179; 1211ex, GX 1189).[71] The other memorandum, dated

70. The prosecution's assertions that Hunt may have had prior notice of USG's announcement is legally irrelevant. Even if the memorandum itself could somehow support an inference that Hunt had prior notice of USG's announcement, it could not support a second inference of a price-fixing agreement based on an inference of prior notice because the express language of the February 4th memorandum and other contemporaneous documents clearly establish that G-P had not yet decided what action to take (2249ex-2257ex, G-P 215-222).

71. The February 14th memorandum also has attached a copy of a USG memorandum that was given to USG salesmen concerning the January 31st announcement and states that it was obtained through "one of our clever agents" who was part of "our spy system" (1192ex, GX 1164). There is no evidence that USG and G-P had any agreement to take similar action and certainly the reference to the use of "spies" is itself inconsistent with the notion of cooperation, much less agreement, between competitors.

March 25, 1969, refers to G-P having received "positive information" that its major competitors were withdrawing discounts on gypsum sheathing effective May 1, 1969 (1195ex, GX 1165). This information was received from the field prior to the time GX 1165 was drafted in its final form (see 2263ex, G-P 231; Tr. 4820-25; compare G-P 230 (2261ex-2262ex) with GX 1165). By March 25th, the date of the memorandum, such information was already public. On March 11th, National instructed its salesmen to notify customers that sheathing discounts were being cancelled (1182ex, GX 1154). In addition, on January 29th, USG had informed its salesmen that it was important to secure the price increase on gypsum sheathing and that there would be no price protection (1178ex, GX 1150). By February 24th, Celotex had told its salesmen to "emphasize to dealers" that the May 1st increase on all gypsum board products would be a "firm" increase (1201ex, GX 1180). Notice of decisions of competitors already announced to the public could not possibly be a sufficient basis for inferring a conspiratorial agreement.

The prosecution's reliance on chance phrases to argue strained inferences, born purely from a marriage of desperation and suspicion, must be rejected as insufficient in the absence of some substantial evidence of an actual agreement. As Judge Medina observed in the *Investment Bankers* case, *United States v. Morgan*, 1953 Trade Cases ¶ 67,586 (S. D. N. Y. 1953) at 68,791:

> "Either there is some agreement, combination or conspiracy or there is not. The answer must not be found

> in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighed and considered in its every aspect."

Criminal convictions must be based on more substantial evidence than competitive efforts to stay abreast of developments in the marketplace.

Because it is a common vice of conspiracy prosecutions that convictions are sought on strained inferences from a "hodgepodge" of ambiguous hearsay statements, *Krulewitch v. Untied States, supra,* 336 U. S. at 453, the existence of conspiracy must be established by proof *aliunde*. *United States v. DeCavalcante, supra,* 440 F. 2d at 1272-73. There, this Court stated:

> "These principles require that in assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators (including co-defendants) must be excluded from consideration" (*Id.* at 1273).

There is no evidence showing that the May, 1969 list price change, or any other price change in the statutory period, was the product of an agreement.

Essentially, the prosecution's case regarding the May, 1969 increase boils down to nothing more than conscious parallelism. The economic evidence discloses that the gypsum industry had been caught in a period of inflationary cost increases when demand was low and prices were depressed. Not surprisingly, one of the larger producers announced a list price increase and other producers decided to follow in the obvious, but unrealized, hope of recouping some of their increased costs of doing business.

The evidence is undisputed that discounting from list prices continued unabated (see *supra* at 14). In fact, at G-P, it was recognized by May 21, 1969 that there appeared there would be no increase in reality (2269ex, G-P 245; see also NG 407, 409). These uncontested facts belie any suggestion of agreement between the defendants either to announce list price increases or to sell only at the increased prices. Under these circumstances, defendants could not, as a matter of law, have been found guilty of conspiring with respect to the May, 1969 list price changes. *See Venzie Corp. v. U. S. Mineral Products Co., supra,* 1975-2 Trade Cases, ¶ 60,481 at 67,135.

2. The December, 1970 "Prompt Payment" Discount Withdrawal on the West Coast.

The facts concerning the elimination of 5% credit terms in the West in December, 1970, are entirely consistent with competitive behavior. At most, they reflect competitive action and reaction leading eventually to parallel conduct.[72] On July 30, 1970, Kaiser announced the elimination of a 5% prompt payment discount in the West (GX 1416). Thereafter, USG, G-P, Celotex, Johns-Manville (JM) and Flintkote each announced it was following Kaiser (GX 1389; GX 1399; 1294ex, GX 1406; GX 1423; GX 1428). However, National advised customers it would retain the 5% terms, and National's competitors cancelled their an-

72. The prosecution's sole evidence of competitive contact relating to the 5% credit terms change was the testimony of Kellogg (a Celotex regional manager) who stated that *after* his company had decided to eliminate the 5% terms, he called Hazeltine (a JM credit manager) and confirmed that JM had already decided to do likewise (2003a-2006a, Tr. 7385-92). This testimony is innocuous in its effect, but in any event is not independent evidence from which a conspiracy among the defendants may be inferred. Moreover, in *Venzie*, uniform action taken by competitors with knowledge of each other's actions, even following a discussion of the common problem, was held insufficient to permit even a civil case to go to the jury (1975-2 Trade Cases, ¶ 60,481).

nouncements in order to stay competitive with National (GX 1394, 1400, 1419, 1425, 1427). Eventually, National announced the elimination of the 5% terms in the West, effective December 21, 1970 (GX 1390), and its competitors followed its announcement at various times thereafter (GX 1391; 1291ex, GX 1404; GX 1414; and 1297ex, GX 1426).

No evidence, independent or hearsay, was offered from which the jury might properly have inferred any conspiracy to withdraw the prompt payment discount on the West Coast, much less the nationwide conspiracy charged in the Indictment. Thus, this aspect of the prosecution's case also should have been taken from the jury since it is plainly insufficient to support an inference of illegal agreement.

3. The May-June, 1971 Wooden Pallet Decisions.

The third episode relied upon by the prosecution is also a simple case of parallel behavior by Michigan area gypsum plants in discontinuing shipments of gypsum board on wooden pallets. These pallets were the property of the manufacturer and the customer was obligated to return them, although they were frequently returned to the wrong manufacturer (1873a-1874a, Tr. 6932-33; 1581ex-1583ex, GX 1762). After learning that USG's losses from theft, vandalism, and non-return of pallets at its Detroit plant had quadrupled in just one year, Edward Pappert, USG's central division manager, decided to discontinue using them and received approval to do so from USG's management and counsel (1863a, Tr. 6909; 1867a, Tr. 6917-18; 1874a-1876a, Tr. 6937-38; 1581ex-1583ex, GX 1762). The USG Detroit plant manager notified his customers of USG's decision by an announcement mailed on May 25th, 1971 (GX 1767).

Subsequently, on June 4th, the USG announcement came into the possession of the Celotex Michigan plant manager who forwarded it to his superiors with the recommendation that Celotex follow (GX 1768).[73] On June 8th, two weeks after USG's announcement, G-P followed USG (GX 1770) and on June 11th, National also followed (GX 1772). On June 14th, the USG plant manager called the Celotex plant manager and mentioned that USG and, according to rumor, G-P had discontinued use of pallets (1584ex, GX 1774)—information that was publicly known and being evaluated by Celotex at the time of the telephone call. Celotex announced that it also was discontinuing use of wooden pallets (GX 1775).

USG's decision to discontinue shipments on pallets was independently made for its own business reasons and publicly announced without any prior discussions with, knowledge of, or commitment from any competitor that it would follow suit (1873a-1874a, Tr. 6933-34). There is no evidence that at any time any competitor agreed with other competitors that each would take like action. The contact between the USG and Celotex plant managers, coming after USG's and G-P's publicly announced decisions, in which public information was repeated, is plainly insufficient to raise an inference of conspiracy. *Venzie Corp. v. U. S. Mineral Products Co., supra*, 1975–2 Trade Cases, ¶ 60,481 at 67,135-36. Moreover, the 1971 Michigan pallet episode is unrelated in time to other events relied upon by the prosecution and limited in locale so that it could hardly provide a basis for inferring the nationwide price-fixing conspiracy charged. *See Kotteakos v. United States,*

---

73. On June 2, 1971, eight days after USG's announcement, USG asked its competitors in the Detroit area to return USG pallets and offered to return any competitor's pallets in its possession (GX 1764, 1765 and 1766).

328 U. S. 750 (1946); *United States v. Central Supply Ass'n*, 6 F. R. D. 526, 528-33 (N. D. Ohio 1947).[74]

Moreover, no evidence was offered that the discontinuance of pallets had any effect on prices.[75] Even assuming, *arguendo*, that a possible consequence of eliminating this one cost of doing business might be to affect prices indirectly, for which no supporting evidence exists, an agreement to discontinue shipments on pallets would still not be a *per se* offense. *See State of Arizona v. Cook Paint & Varnish Co.*, 1975–2 Trade Cases, CCH Trade Reg. Rep., ¶ 60,450 (D. Ariz. 1975) at 67,014-15. Both under the evidence and law, therefore, the decisions to discontinue use of pallets in Michigan should not have been tendered to the jury as evidence from which they could infer a nationwide price-fixing conspiracy.

4. Lower Prices in the Southwest in 1970.

Gypsum board prices were depressed throughout the country in 1969 and 1970 due to a continuing recession in the housing industry and fierce competition (2155a-2157a, Tr. 8997-9003; 2278a-2279a, Tr. 9303-04; 2280a-2282a, Tr. 9307-08; 2297a-2298a, Tr. 9337). Historically, prices were

74. The prosecution offered no evidence suggesting that USG's 1971 decision to eliminate use of pallets was in any way connected to the aborted activities of a Gypsum Association "task force" in December, 1966 which discussed the desirability of eliminating pallets at that time (see *infra* at 95-96). Pappert of USG was not involved in the discussions five years earlier and was not aware of them (Tr. 6916-17; 1873a-1874a, Tr. 6933). His decision was independently made based on USG cost data and only suspicion could suggest otherwise (1873a-1874a, Tr. 6933).

75. Celotex evidence disclosed that elimination of pallet shipments had no effect on prices (3042a, Tr. 11,746-50; CEL 63-70). In the absence of evidence of effect on prices, the jury could not have based a guilty verdict on the pallets episode since the trial court charged that any agreement to eliminate pallets was not unlawful unless it had the purpose and effect of raising, maintaining and stabilizing the price of gypsum board (3884a-3886a, Tr. 14,859-60).

generally lower in the Southwest than in the rest of the country because of lower production costs and more total production of gypsum board per capita in that area (Tr. 3777-78; see also Tr. 12,539). Gypsum board plants in the Southwest were operated more efficiently and at a lower cost due to the availability of large, readily accessible deposits of gypsum and other raw materials such as paper (2294a-2295a, Tr. 9330-31; 2365a-2368a, Tr. 9721-24; 2728a-2731a, Tr. 10,800-02). In addition, the heavy concentration of gypsum plants in the Southwest (2293a, Tr. 9329; 2052ex, USG 406A) when compared with the sparse population in that area resulted in lower prices there (Tr. 8640-41).[76] Notwithstanding those uncontradicted economic facts, the prosecution argued that the lower prices charged by defendants in the Southwest in 1970 were part of an effort to drive one single-plant producer, Republic Gypsum Company, out of business.

The Republic episode was a transparent ploy by the prosecution not only to explain away competitively low prices within the statutory period, but to appeal to jury prejudice by suggesting that the larger companies were "ganging up" on a "little guy." Uncontroverted evidence showed that, rather than "ganging up," defendants assisted Republic. Celotex held an ownership interest in Republic,

76. Rhyne Simpson, Jr., a former president of Republic Gypsum and a prosecution witness, testified that when Republic started production in 1964, there were 12 companies competing with Republic in the Southwest and that Republic was the last competitor to enter that market (776a-779a, Tr. 2137-40; Tr. 2403). A feasibility report dated September 25, 1967, prepared for Republic, pointed out that prices dropped in the Southwest between 1961 and mid-1965 as a result of 19 new plants being constructed, 5 of which were built by new entrants into the industry (Tr. 2217-21; USG 71, second part pp. 1-2). Simpson acknowledged that housing starts were low from 1968-70, that when housing starts are up there is greater demand for wallboard (852a-853a, Tr. 2407-08), and that he was in an extremely competitive business from 1965 to 1973 (781a, Tr. 2170).

purchased wallboard from Republic's Duke, Oklahoma plant, and had a buy-sell agreement with Republic (843a-845a, Tr. 2373-84; 2362ex-2393ex, CEL 1-6). National supplied much of Republic's requirements for gypsum board paper and extended Republic a $350,000 line of credit in January, 1971, when another paper supplier (Packaging Corporation of America) was in the process of terminating Republic's credit (734a-735a, Tr. 2036-37; 824a-830a, Tr. 2301-13; 2100ex-2101ex, NG 3; 2107ex, NG 8). In 1970, Republic was manufacturing fire-rated wallboard under a patent license from G-P (Tr. 2321; 838a-840a, Tr. 2359-61), and over the years, G-P's Acme, Texas plant exchanged paper and other raw materials with Republic (842a-843a, Tr. 2365-66).

Even more significant than the affirmative, exculpatory evidence of aid and assistance offered by defendants to Republic, is the fact that there is *no* evidence in the record of any agreement between defendants to charge lower prices. Contemporaneous internal documentation within USG expressly refutes the suggestion of an agreement and demonstrates that while USG may have desired to raise prices, competitive forces effectively prevented it from doing so.[77] Indeed, as the market improved, Republic not only survived but, during its fiscal years 1972 and 1973, was enjoying profits (799a-803a, Tr. 2226-30).

77. For example, in the Spring of 1970, USG officials were evaluating a number of possible pricing strategies to obtain a higher return for its products (USG 963). According to USG's view of the market, the competitive innovations resulting from G-P's aggressive marketing policies made it unrealistic to think that any announced price increase could actually be implemented (USG 963). Indeed, in July, 1970 USG adopted a G-P War Zone Program on a nationwide basis and issued price reductions for entire areas to meet G-P competition (2280a-2286a, Tr. 9307-17). Nonetheless, the evidence clearly indicates that USG was anxious to try to raise its prices if and when competitive factors permitted (USG 963). Similarly, J. P. Hayes of National testified, without contradiction, that raising prices was just what he was trying to do (2652a-2653a, Tr. 10,573-74). This evidence cannot be simply disregarded and replaced by mere suspicion that defendants actually wanted to keep prices low to drive out a competitor.

Submission of the Republic Gypsum episode to the jury in the absence of any supporting evidence of agreement permitted the prosecution to succeed in a cynical distortion of pro-competitive conduct responsive to the laws of supply and demand. The evidence was entirely consistent with the conclusion that competition had reduced prices to a low level and kept any firm from increasing its prices without risking a substantial loss of volume. The entire Southwest pricing situation exemplified pricing behavior which resulted in lower prices to the consumer due to the absence of any agreement interfering with the expected operation of market forces and, consequently, the Republic Gypsum episode provided no basis for an inference of conspiracy.

B. Events in the Pre-Statutory Period Are Insufficient to Establish the Antitrust Conspiracy Charged.

Because the evidence within the statutory period is insufficient to infer any conspiracy, the prosecution preferred to dwell on stale evidence from years well prior to the statutory period. This tactic was prejudicial to defendants in many ways since relevant evidence was lost in the intervening years, the protections of the limitations bar were negated, and ultimately variance occurred between the Indictment and the proof (see *infra* at 98-102). Nonetheless, nothing that occurred in the pre-statutory period serves as a sufficient predicate to infer a conspiratorial agreement in effect after December 27, 1968.

In a conspiracy case, pre-statutory period evidence is relevant only as background to shed light on the alleged formation and scope of the claimed conspiracy; such evidence by itself is legally insufficient to sustain a finding of a

conspiracy within the relevant statutory period. *Grunewald v. United States*, 353 U. S. 391, 399-406. *See also United States v. Kissel*, 218 U. S. 601 (1910); *American Tobacco Co. v. United States*, 147 F. 2d 93, 120 (6th Cir. 1944), *affirmed* 328 U. S. 781 (1946). Otherwise, the protections of the statute of limitations are lost. *Grunewald v. United States, supra*, 353 U. S. at 402.

Acquittals are required here unless the pre-statutory period evidence is somehow sufficient to establish both (a) that some conspiratorial agreement was formed in the earlier period, the scope of which contemplated continuing price-fixing activities extending into the statutory period, *United States v. Borelli, supra*, 336 F. 2d at 385, and (b) that defendants' later conduct was pursuant to that pre-existing conspiratorial agreement. *United States v. Johnson, supra*, 65 F. Supp. at 48. The pre-statutory evidence is inadequate to accomplish either burden borne by the prosecution. That evidence also falls into four discrete categories. None of the four episodes affords any basis for an inference that later, unrelated events occurring within the statutory period were conspiratorial, much less that defendants were engaged in a unitary, nationwide price-fixing conspiracy from the early 1960's extending beyond December 27, 1968.

1. The Claude Huckleberry/Texas Gypsum Complaints, 1960-65.

Appealing to jury sympathy, the prosecution sought to prove and later argued to the jury that defendants conspired beginning in 1960 to drive Texas Gypsum Company, a new single plant producer, out of business (Tr. 13,807-28). Its chief witness was Claude Huckleberry, who began Texas Gypsum in El Paso, Texas, without prior manufacturing experience and who was replaced by his

partners in January, 1965 (Tr. 2929-31; 1038a-1040a, Tr. 2906-08). The bulk of the evidence concerning Texas Gypsum related to events in 1961 and 1962 and, in fact, after Huckleberry's departure in 1965, that company built another plant and continued as a viable competitor throughout the statutory period (50ex, GX 7, Schedule "C"; Tr. 2170).

According to the evidence, Huckleberry began his business with a hope of cornering 75 percent of the El Paso market (932a-933a, Tr. 2709; Tr. 2996). He used two methods to undersell existing competitors—shipping smaller truck load shipments at rail car rates and delivering wallboard directly to construction sites (934a-936a, Tr. 2712-14), thus saving both the dealer and contractor transportation and handling expense. Competitors naturally responded to Texas Gypsum's innovations by offering special discounts and allowances to El Paso-area customers. Huckleberry felt that these allowances were not fair competition (1063a-1065a, Tr. 3104-06). In the fall of 1962, Huckleberry moved his plant to the Dallas area where, he testified, he encountered similar competitive measures after he began offering his special trucking services and rates (1025a-1027a, Tr. 2883-85). No independent evidence was offered that Texas Gypsum's competitors, including defendants, entered into any agreement to charge lower prices in either the El Paso or Dallas areas or to drive Texas Gypsum out of business.

Over objection, Huckleberry was permitted to testify to a conversation on January 3, 1961, with Melvin Quayle, a deceased employee of another single-plant producer, American Gypsum Company (Tr. 2690-91; 942a-944a, Tr. 2722-23; 979a-992a, Tr. 2805-19; see also Tr. 605-09). Quayle was totally unconnected with any facet of the claimed conspiracy except for his one conversation with

Huckleberry."[78] According to Huckleberry, Quayle told him:

> "All the big boys have been on the telephone trying to get me to come down here and see if there wasn't some way that we could straighten this thing out before any one moved against Texas Gypsum" (958a-959a, Tr. 2752).

Huckleberry also testified that Quayle said that he had cleared prices with USG and if Texas Gypsum joined the Gypsum Association, Huckleberry could do the same (958a-960a, Tr. 2752-54). By the time of trial, Quayle had died, leaving defendants no effective way of meeting this prejudicial, hearsay testimony.[79]

Huckleberry was also permitted to testify to two other hearsay statements. One, he said, occurred on December 2, 1960, when M. M. Hardin, president of American Gypsum, expressed the view that USG, National, Celotex and Flintkote had agreed that unless he [Huckleberry] stopped shipping in truckloads, they would "move in and kill me" (954a-955a, Tr. 2747).[80] The other hearsay statement occurred in 1963 when, according to Huckleberry, Malcolm Meyer of Bestwall Gypsum (who left the gypsum industry in 1965 and was also unconnected to any price-fixing conspiracy) told Huckleberry that the Gypsum Association was a clearing house for prices and policies (961a-963a, Tr. 2757-59). Malcolm Meyer, called as a prosecution witness, denied making such a statement (926a-929a, Tr. 2658-61).

78. See *infra* at 123-25. Quayle being dead, the prosecution was allowed to argue from his [Quayle's] grand jury testimony that after Quayle learned that Huckleberry had tape recorded their conversation, he reported that fact to other competitors (988a-990a, Tr. 2815-17; Tr. 13,813). That bare fact is insufficient to connect Quayle to any conspiracy and permitting the prosecution to argue it was grossly unfair. *United States v. DeCavalcante, supra,* 440 F. 2d at 1272-73.

79. Defendants objected to Huckleberry's testimony about his conversation with Quayle. At the suggestion of the trial court, to which some defendants acceded but others objected, portions of Quayle's grand jury testimony were read to the jury (942a-946a, Tr. 2722-26; 971a-978a, Tr. 2794-802). In that testimony, Quayle denied that he was in any sense an "emissary" of defendants and denied that they were responsible for his visit to Huckleberry (985a-986a, Tr. 2812; 992a, Tr. 2819).

80. Huckleberry also testified Hardin told him late in 1961 that he [Huckleberry] was "dead in the industry" (Tr. 3081-82). There was no evidence connecting Hardin to any price-fixing conspiracy.

The Huckleberry hearsay testimony was the only evidence in the record directly suggesting that defendants were engaged in any type of illegal combination.[81] All the hearsay occurred more than five years before the statutory period and was uttered by persons who were not shown by independent evidence to be in any sense "agents" of any defendant.[82] It all should have been excluded at trial and, similarly, should be excluded from consideration on this appeal. *United States v. DeCavalcante, supra,* 440 F. 2d at 1272-73.

By the prosecution's own evidence, the Texas Gypsum episode was limited in time and locale and was over by January, 1965 at the latest.[83] As Huckleberry himself

81. The prosecution presented evidence of a meeting in March, 1962, between defendant Nicely and a Dallas dealer, John Tinsley (895a-902a, Tr. 2539-48). That evidence, which is dealt with in defendant Nicely's separate appellate brief, also does not support the charge that defendants engaged in a price-fixing conspiracy against Texas Gypsum.

82. The prejudice to defendants from the Huckleberry testimony is indicated by the fact that the prosecutor referred to Huckleberry 83 times in closing argument, more than any other witness. The Texas Gypsum evidence was also highly prejudicial because it pertained to events occurring in the early 1960's, and defendants had lost through death or retirement many of the potential witnesses who could have been able to dispute Huckleberry's version of the facts (see *infra* at 119-21).

83. G-P did not even enter the gypsum industry until Spring, 1965, or after Huckleberry had left Texas Gypsum (1ex-3ex, GX 7, pp. 1-3). Andrew Watt was not employed in the gypsum industry during the period mid-January, 1961—mid-February, 1962 (48ex, GX 7, p. B-1).

recognized in part (1057a-1059a, Tr. 3007-09; 1063a-1065a, Tr. 3104-06), the circumstantial evidence of defendants' responses to Huckleberry's innovations is consistent with competitive behavior. More importantly, that evidence is patently insufficient to support an inference of a continuing nationwide agreement to fix prices existing after January, 1965, even were one to assume that defendants had conspired with regard to Texas Gypsum.

2. Price and Credit Term Announcements in 1965 and 1966.

Apart from Texas Gypsum, the bulk of the prosecution's case centered on events occurring in late 1965 and early 1966 regarding certain price and credit term announcements by the corporate defendants and other competitors.[84] These included a September 1, 1965 increase on fire-rated wallboard, withdrawal of so-called applicator allowances in Washington and Oregon in October, 1965, withdrawal of all discounts on December 15, 1965, and a revision of credit terms effective on March 1, 1966. There is no evidence that any of these actions contemplated or related to subsequent pricing or credit decisions of the defendants. Consequently, any inference that the events in 1965 and 1966 were in any way related to an agreement indefinite in both time and scope to act in concert on

84. Reliance by the prosecution on the 1965-66 period was anticipated by defendants since Judge Zirpoli had held that circumstantial evidence under a *civil* standard of proof established that certain corporate defendants (not including Celotex or G-P) had conspired in announcing a December 15, 1965 price change and a March 1, 1966 credit terms change. Although the evidence is not sufficient in this criminal case to sustain an inference of conspiracy as to those events, that issue is moot since nothing in that evidence supports an inference of an agreement to fix prices after December 27, 1968. In fact, Judge Zirpoli held that the civil conspiracy and all its impact had been dissipated by no later than January 1, 1968. *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 327-28 (N. D. Cal. 1971).

future, unspecified pricing and credit decisions must rest solely on suspicion and cannot be drawn from the evidence.

The evidence concerning 1965-66 pricing demonstrates that each decision was confined to the specifics of the action then being taken and in no way pertained to future matters. The September 1, 1965 increase on fire-rated board was announced first by G-P (322ex, GX 300; Tr. 4141-42) and followed subsequently by National, USG and others (327ex, GX 305; 328ex, GX 306; GX 343; and 373ex, GX 347). There was substantial discounting off this increase after September 1 (2492ex, CEL 1111). The only evidence the prosecution contended showed the increase to be conspiratorial were inquiries made or possibly made of competitors after the public announcements concerning whether price protection had been offered in conjunction with the September 1st increase (324ex, GX 302; 361ex, GX 339; and 363ex-364ex, GX 341). Parallel action by some, but not all, defendants in ending a special allowance to "applicator" customers of dealers in Washington and Oregon in October, 1965 was also argued by the prosecution to have been conspiratorial on the basis of one G-P memorandum stating that Gimlin of USG had called A. L. Meyer of G-P asking for a "reaction to ways and means of eliminating applicator allowances in the Portland (Ore.) Market" (378ex, GX 371). Thus, the evidence on these two subjects concerned at most only communications relating to the specific increase previously announced for fire-rated wallboard and the withdrawal of applicator allowances in one local market.

Similarly, the evidence of alleged conspiratorial behavior regarding the December 15, 1965 withdrawal of all discounts was limited to changes made at that time and was in no way connected with events occurring after May, 1967, when National announced a nationwide price decrease (2125ex-2126ex, NG 28-29). The prosecution's evidence consisted solely of opportunity contacts, parallel

behavior and circumstantial evidence purporting to show advance notice to National of USG's November 17, 1965 announcement of the December 15th price change.[85] No evidence connects the decisions made by defendants in late 1965 with subsequent decisions made in 1967 and 1968 or thereafter within the statutory period.

Nor can the March 1, 1966 credit terms change be distorted into evidence of an indefinite conspiratorial agreement to take unspecified future action. Once again, the prosecutor's argument of conspiracy regarding the March, 1966 episode is built on strained inferences from one ambiguous document which the author denied reflected any agreement between competitors to take concerted action.[86] All that the evidence discloses is that USG, which

85. All witnesses participating in National's decision to follow USG denied having any advance notice of USG's November 17 announcement (1585a-1590a, Tr. 5834-40; 3416a-3418a, Tr. 13,052-54; 3454a-3456a, Tr. 13,103-05; 3458a-3461a, Tr. 13,109-11; 3463a-3466a, Tr. 13,114-19; 3554a-3557a, Tr. 13,253-57; see also Tr. 6380-85; 2553a-2561a, Tr. 10,376-89). There is no evidence that USG had advance commitments from *any* competitor before it made its initial announcement. The evidence in this case as to the existence of an agreement in 1965-66 differed from that considered in *Wall Products* and was insufficient to support any inference of conspiracy. See Briefs for Colon Brown and J. P. Nicely.

86. The prosecution argued that a conspiracy could be inferred from the statement in a memorandum by Fredericks of G-P that "there is a current study underway within our division (and the industry) to both discontinue extended terms and revise normal terms." (943ex, GX 914). Fredericks testified that he was not aware of any industry study and that his parenthetical phrase merely referred to his assumption that the credit problems faced by the industry would be of concern to all suppliers (Tr. 5193-95). There was no evidence that there ever was an industry study or approach relating to extended credit terms. The prosecution also asked the jury to speculate that Fredericks and defendant Brown met and discussed credit terms on December 10, 1965. It cited a memorandum by Brown (915ex, GX 908) exhorting his subordinates to make recommendations for a proposed change in credit terms, dated December 10, 1965 and a calendar entry showing a scheduled meeting on that day. There was no evidence that Brown or Fredericks discussed credit terms on December 10 (if they met then) or any other time. See Brief for Colon Brown.

faced spiraling receivables, announced its credit terms changes on January 26, 1966 (950ex-953ex, GX 916; 1044ex-1046ex, GX 949), and that National, also facing the same problem (903ex-914ex, GX 907), and other competitors subsequently followed USG's action (1036ex-1043ex, GX 942-948).

While defendants continue to maintain that the evidence is insufficient to conclude that all or any of the price and credit term changes in 1965 and 1966 were conspiratorial, that issue need not be decided by this Court. Even assuming that these changes were conspiratorial, there is no evidentiary basis from which one could rationally infer that such conspiracy was of indefinite duration and limitless scope so as to include within its compass subsequent pricing and credit decisions made two years or more in the future. Any assumed conspiracy during 1965 and 1966 would have been in existence during a limited period only and would have terminated after the specific pricing and credit changes were no longer effective. All the evidence is limited to the four specific changes made and cannot be generalized through speculation or suspicion to have involved alleged agreements of a far broader, indefinite nature.

The limited scope and purpose of the 1965-66 actions is buttressed by the fact that defendants had ceased to adhere to them long before the statutory period commenced. Though USG attempted to adhere to its announced policy of no discounting following December 15, 1965, by the end of 1966 it was apparent its major competitors were not doing the same, since USG suffered a very substantial loss in market share during 1966 (compare 1991ex, USG 306 with 2097ex, USG 1200). By May, 1967, discounting to win over more customers became so intense that National

announced a nationwide list price decrease for all major board products (2125ex-2126ex, NG 28, 29), which nullified list prices established on December 15, 1965.[87] Further, by 1967 and especially 1968, all defendants were approving price discounts and allowances to customers to meet each other's competition, as well as that of single plant producers (See 1986ex-1989ex, USG 301A-304A; 2301ex, G-P 385; 2315ex-2316ex, G-P 411; 2475ex, CEL 61; 2152ex-2155ex, NG 349-354; 2292ex-2300ex, G-P 383). At USG, by October 1968, discounts from list price had been approved in quotations to customers covering quantities equal to 134% of USG's entire 1967 volume of wallboard sales (2064a, Tr. 8233; 1983ex, USG 166). Much of this discounting was attributable to the lower prices being charged by G-P through its distribution centers in its quest for additional market share (2019ex-2020ex, USG 401, pp. 3-4; see also, *supra* at 13, n. 12).[88] Moreover, by 1968, extended credit terms and a more favorable cut-off date had reappeared. Thus, the only two features of the March 1, 1966 credit terms change which adversely affected customers were no longer in effect.[89]

87. The list price for fire-rated board established in September, 1965 had changed several times by the commencement of the statutory period over three years later (See e.g., GX 3127; 3130; 3131; 3133; 2132; 3135; 3134; 3164; and 2125ex, NG 28).

88. One feature of the December 15, 1965, decisions was the centralization within some defendant corporations of pricing authority in the chief executive officer. G-P and Celotex never had this policy and the other defendants had delegated pricing authority to subordinate officers by 1968 (2052a-2053a, Tr. 8163; 2113a-2117a, Tr. 8610-16; 2542a-2544a, Tr. 10,354-57).

89. In September, 1966 a more favorable cut-off date on billings than the pre-1966 credit terms was established in 32 states and, by September, 1968 in the remaining states (2069ex-2070ex, USG 605; 2147ex-2148ex, NG 270-331). Defendants were again granting extended credit terms, which had been withdrawn on March 1, 1966, by, at the latest, early 1968 (1982a, Tr. 7320; Tr. 7438-39; 2544a-2546a, Tr. 10,357-61).

These changes in prices, credit terms, and policies occurring after March 1, 1966, show not only that the effect of prior decisions had been dissipated prior to the statutory period, but more importantly, that defendants could not be found to have continued their adherence to those earlier decisions. Thus, the 1965-66 price and credit term changes are plainly insufficient to infer either that an assumed conspiracy in that period continued into the statutory period or that subsequent pricing decisions within the statutory period were within the scope and purpose of any earlier conspiratorial agreement.

3. The Wooden Pallets Discussion in December, 1966

The prosecution showed that in December, 1966, subordinate transportation and materials handling officials of defendant corporations discussed and tentatively agreed upon the desirability of eliminating shipments on wooden pallets from Michigan-area gypsum plants. This discussion occurred at a "task force" meeting of a Gypsum Association materials handling committee (1567ex-1571ex, GX 1748). Before any action was taken by the task force to recommend such discontinuance to even its parent committee, it was reviewed and disapproved by Association counsel (513a-514a, Tr. 1291; 527a-528a, Tr. 1345). The evidence discloses that the idea was dropped in reliance on counsel's advice (527a-528a, Tr. 1345) and no further discussion or action occurred with respect to it.

Importantly, Pappert of USG, who made that company's independent decision in 1971 to discontinue its use of pallets due to mounting losses from their theft and vandalism, was not involved in and was completely unaware of the task force discussion more than four years earlier (1873a-1874a, Tr. 6933; see *supra* at 80-82). While a

jury might have been entitled to disbelieve the testimony establishing the independent nature of the 1971 pallet discontinuance, there is only suspicion, and no evidence, to support the prosecution's alternative conspiratorial hypothesis. "[M]ere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy." *Venzie Corp. v. U. S. Mineral Products Co.*, 1975-2 Trade Cases, ¶ 60,481 at 67,135. In addition to the difference in time between the two episodes, the fact that neither episode was shown to have had any effect on prices precludes reliance on either episode as being probative of the nationwide price-fixing conspiracy charged. *See State of Arizona v. Cook Paint & Varnish Co.*, 1975-2 Trade Cases, ¶ 60,450 (D. Ariz. 1975).

4. Withdrawal of the Prompt Payment Discount in 1968.

One of the several pro-competitive changes of credit terms after March 1, 1966 was the extension by various gypsum producers, beginning in May-June, 1967, of a 5% cash discount for prompt payment of invoices. This discount was introduced by Kaiser Gypsum in May, 1967 (1214ex, GX 1200) and was subsequently followed by other competitors (1215ex-1217ex, GX 1201; 1219ex, GX 1205). After Flintkote followed Kaiser by announcing a similar but not identical 5% discount [90] (1233ex-1234ex, GX 1221-1222), other competitors announced terms comparable to Flintkote's (1225ex, GX 1211; 1231ex, GX 1219 and 1236ex-1237ex, GX 1224). In April, 1968 a G-P credit man told a Kaiser credit manager that G-P was considering eliminating the 5% discount on a nationwide basis (1241ex, GX 1342). However, there is no evidence that there was anything more to the conversation or that it had any effect on G-P's decision.

90. Flintkote's cut-off dates for earning the cash discount were different from Kaiser's dates (Compare 1214ex, GX 1200 with 1233ex-1234ex, GX 1221-1222).

The uncontradicted facts are that USG, *not* G-P or Kaiser, first announced on May 29, 1968 that it was eliminating the 5% terms in the West (2069ex-2070ex, USG 605; GX 1364). After USG's announcement, National and Kaiser announced that they were retaining the 5% terms in the West, while G-P and JM followed USG (GX 1364). To meet competition from Kaiser and National, USG then announced it would also retain the 5% in the West (2069ex-2070ex, USG 605). G-P followed USG's action (GX 1348). On July 8, 1968 USC announced elimination of the 5% terms in the East (2069ex-2070ex, USG 605) which was followed at various times thereafter by other competitors (1243ex, GX 1346; 1244ex, GX 1347; GX 1359; GX 1363; 1278ex-1279ex, GX 1377; and 1281ex, GX 1381a). Although the elimination of the 5% terms in the East was announced for September 16, 1968, contemporaneous evidence shows that as late as December, 1968 and January, 1969, National was extending 5% terms to some of its customers in the East to meet competition from G-P (GX 1341, NG 442 and NG 478).

The evidence concerning the discontinuance of the 5% discount in the East is patently insufficient to permit an inference of conspiracy. No evidence connects this event with the discontinuance, two years later, of the 5% discount in the West (see *supra* at 79-80). The failure of National and Kaiser to follow an elimination of the 5% in the West in 1968, the lapse of more than two years before the discount was actually eliminated in the West, and the lack of success in the initial announcements in 1970 preclude an inference that there was a "continuing" agreement to effect the elimination of the 5% prompt payment discount.

C. There Was No Substantial Evidence of the Single Nationwide Price-Fixing Conspiracy Charged in the Indictment and Allegedly Extending From 1960 Through 1973.

Whether considered individually or collectively, the disparate episodes relied upon by the prosecution are quite insufficient to show, directly or inferentially, the requisite agreement to engage in a nationwide price-fixing conspiracy after December 27, 1968. The events within the statutory period are insufficient under established antitrust law to make out a criminal case of conspiracy of any type, much less the broad price-fixing conspiracy charged. Thus, there is no evidence within the statutory period by which it could be found that defendants were conscious participants in an antitrust conspiracy. This conclusion alone requires acquittal unless the prosecution was able, as it was not, to show by substantial evidence that apparently lawful behavior after December 27, 1968, was in furtherance of a conspiratorial agreement formed prior to that date.

The critical inquiry is whether there is substantial evidence from which it may rationally be inferred that defendants entered into a conspiratorial price-fixing agreement, the objectives of which extended into the statutory period. *See United States v. DeCavalcante*, 440 F. 2d 1264, 1275 (3rd Cir. 1971); *United States v. Borelli*, 336 F. 2d 376, 384 (2nd Cir. 1964). In *Borelli*, Judge Friendly held that the scope and purpose of any conspiratorial agreement had to be determined as to each defendant to assure both that the statute of limitations was enforced and that each defendant was not improperly held accountable for the acts of others:

> "There has been a tendency in such cases, 'to deal with the crime of conspiracy as though it were a group [of men] rather than an act' of agreement. *See* 72 Harv. L. Rev. at 934. Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.
>
> • • •
>
> "[T]he Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation, *Grunewald v. United States*, 353 U. S. 391, 397, . . . (1957), and the scope of his agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own,' *United States v. Falcone*, 109 F. 2d 579, 581 (2nd Cir.), *aff'd* 311 U. S. 205 . . . (1940), it becomes essential to determine just what he is promoting and making 'his own' ". *United States v. Borelli*, *supra*, 336 F. 2d at 385.

In *Borelli*, the Court held that although a defendant had conspired in the pre-statutory period to import and resell heroin, it could not rationally be inferred that he was also responsible for a subsequent importation of additional heroin within the statutory period by some of the same principals but utilizing a new source of supply.

The *Borelli* and *DeCavalcante* opinions enforce the principle laid down in *Kotteakos v. United States*, 328 U. S. 750, 772 (1946), that, "Guilt with us remains individual and personal, even as respects conspiracies." There, the

Court held that it was error to have instructed the jury that they could infer a unitary conspiracy from multiple conspiracies:

> "On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." *Id.* at 771.

Because of the dangers of "transference of guilt" from one lesser conspiracy to the separate conduct, lawful or unlawful, of other defendants, a mass trial of multiple conspiracies under the guise of a broad single conspiracy was held prejudicial to the substantial rights of the defendants. *Id.* at 774-75.

Unlike *Borelli* and *Kotteakos*, the present case does not present the issue of whether two conspiratorial episodes, one preceding the other, are sufficiently related in scope and purpose to find them part of the same agreement. In this case, the prosecution bore an even heavier burden of demonstrating that *lawful* business behavior in the statutory period was actually pursuant to a pre-existing conspiratorial agreement, which supposedly was formed prior to the statutory period and which carried forward. Because that burden was not met, acquittals are required.

Moreover, even were it assumed that each of the various episodes relied upon by the prosecution was conspiratorial, "connecting links" between them "are supplied only by the prosecution's arguments." *United States v.*

DeCavalcante, supra, 440 F. 2d at 1275. No evidentiary basis exists, for example, to suppose that the events regarding Texas Gypsum in 1960 were at all related to the events regarding Michigan pallets in 1971. The episodes relied upon by the prosecution are distinct in time and subject matter and confined in scope and purpose, even assuming that any or all might be considered conspiratorial standing alone. Thus, on this record, the prosecution failed to prove the existence of a unitary, nationwide price-fixing conspiracy within the statutory period, as charged.

Under these circumstances, acquittals are required because of the insufficiency of the evidence to prove the offense charged. Moreover, there was a fatal variance between the Indictment and the proof. *See Kotteakos v. United States*, 328 U. S. 750 (1946). In *United States v. Lester*, 282 F. 2d 750, 753 (3rd Cir. 1960), *cert. denied*, 364 U. S. 937 (1961), this Court, quoting *Lefco v. United States*, 74 F. 2d 66, 68 (3rd Cir. 1934), said that, "Evidence that establishes another conspiracy or several other conspiracies will not sustain the verdict," where a single, continuous conspiracy has been charged. And, in *United States v. Central Supply Ass'n*, 6 F. R. D. 526, 528-33 (N. D. Ohio 1947), acquittals were granted where separate conspiracies, rather than the one general conspiracy alleged, were proven because there was a "fatal variance between the indictment and the proof." *Id.* at 532. *See also, Rocha v. United States*, 288 F. 2d 545, 550-53 (9th Cir. 1961); *United States v. Russano*, 257 F. 2d 712 (2nd Cir. 1958).

Variance requires reversal when its potential for prejudice is apparent in the record. *See, e.g., Kotteakos v. United States, supra*, 328 U. S. at 772-74. One particularly acute type of prejudice caused by variance is "transference of guilt." As the foregoing discussion of the evidence makes clear, defendants in this case, were prejudiced by

the possible "transference of guilt" from episodes in which they were uninvolved. As observed in a recent case, *United States v. Bertolotti* (2nd Cir. November 10, 1975), a variance's potential for prejudice is greatly magnified as the "size" of the case increases (Slip Op. at 13). In *Bertolotti*, the court reversed for variance in a case involving four separate "episodes", sixty alleged co-conspirators, and less than four weeks of trial (Slip Op. at 13-16). The present case involved eight separate categories each consisting of several "episodes", over 160 co-conspirators, nineteen weeks of trial, and, moreover, an additional factor not present in *Bertolotti:* a severe statute of limitations problem. Defendants were seriously prejudiced by introduction of the massive amount of inflammatory and irrelevant evidence predating the statutory period. See *United States v. Russano, supra.* Thus, the variance in this case unquestionably prejudiced defendants and requires reversal of their convictions.

None of the prosecution's evidence relating to any issue constitutes substantial independent evidence of the conspiracy charged. As previously shown, reversal would be required even if acquittals were not granted because of the trial court's fundamentally prejudicial mistakes on the central issue of verification. In the succeeding sections of this brief, other extensive judicial errors affecting all areas of the case, combined with extreme prosecutorial misconduct, and concluding with coercion of a hopelessly deadlocked jury, are discussed to demonstrate that additional grounds mandate reversal and a new trial even if the evidence had been sufficient to sustain the prosecution's burden.

III. Defendants Were Severely Prejudiced by the Trial Court's Repeated Errors and Its Partiality Toward the Prosecution.

As here, misuse of the "continuing conspiracy" charge is a not uncommon tactic to facilitate the prosecution's introduction of hearsay evidence and to avoid the limitations bar. *Grunewald v. United States, supra,* 353 U. S. at 391-406. The prejudice caused to defendants by this tactic was extreme because the trial court abdicated its judicial functions of managing the trial and protecting against such abuses. The errors committed by the trial court, discussed below, require reversal since it cannot be said "with fair assurance" that the verdicts below were not substantially swayed by them. *Kotteakos v. United States, supra,* 328 U. S. at 765. It cannot be concluded beyond a reasonable doubt that these errors were harmless. *Chapman v. California,* 386 U. S. 18, 24 (1967). The many errors—some of constitutional magnitude—severely prejudiced the defendants and thus require reversal.

A. The Trial Court Prejudicially Refused to Give a Proper Final Charge on Key Conspiracy Law Principles.

The potential vices of massive "continuing conspiracy" prosecutions are well recognized. *Krulewitch v. United States, supra,* 336 U. S. at 445-58; *Kotteakos v. United States, supra,* 328 U. S. at 776-77; *United States v. DeCavalcante, supra,* 440 F. 2d at 1272-76. One such vice, noted above, is that remote events falling outside the statutory period may improperly become the basis for conviction. Other dangers are equally significant in their threat-

ened deprivation of substantive rights. A jury may be induced to convict innocent persons based on the conduct of absent persons for which the defendants may not properly be held accountable. Or, the jury may predicate guilt on suspected offenses which vary or are separate from the actual offense charged. In all these situations, due process is denied because a defendant may be found guilty even though he is innocent of the crime charged in the indictment.

To guard against such denials of due process, it is the obligation of the trial court to give the jury adequate instructions which ensure that the jury considers guilt or innocence only in the context of the offense charged. Despite the submission of proper, routine instructions by the defense, the trial court in this case improperly refused to give an adequate conspiracy law charge and thus committed serious, prejudicial error.

1. A "Kotteakos" Instruction on Single Rather Than Multiple Conspiracies Was Required But Not Given.

In a "continuing conspiracy" prosecution, the jury must be instructed that separate and distinct conspiratorial episodes are insufficient support for a finding of guilt. *Kotteakos v. United States, supra*, 328 U. S. at 767-74; *United States v. Central Supply Ass'n, supra*, 6 F. R. D. at 528-33. Such an instruction is routinely given and was requested in this case but refused.[91]

91. A *Kotteakos* instruction on the issue of "single" versus "multiple" conspiracies was submitted to the trial court in a form patterned on that given in *United States v. Johns-Manville Corp.*, Cr. 21-118 (E. D. Pa. 1962), *ABA Jury Instructions in Criminal Antitrust Cases*, 482 at 512-14 (1965). See Def. Supp. Req. 3

An adequate instruction to this effect is essential to "scrupulously safeguard each defendant individually" and often becomes a defendant's "principal protection against unwarranted imputation of guilt from others' conduct." *Kotteakos v. United States, supra*, 328 U. S., at 776-77. *See also United States v. Perez*, 489 F. 2d 51 (5th Cir. 1973); *United States v. Borelli, supra*, 336 F. 2d at 382-87; *Rocha v. United States*, 288 F. 2d 545 (9th Cir. 1961); *United States v. Russano*, 257 F. 2d 712 (2nd Cir. 1958). Thus, failure to instruct the jury on the issue of single versus multiple conspiracies, when the evidence raises this issue, is clear error. *United States v. Varelli*, 407 F. 2d 735, 746 (7th Cir. 1969).

The disjointed and episodic character of the prosecution's evidence in this case made the failure to give a *Kotteakos* instruction particularly prejudicial. Significant issues were raised as to whether, for example, the distant events regarding Texas Gypsum in the early 1960's or the 1965 pricing decisions, were separate, unconnected occurrences and whether, even if considered together, they bore any conspiratorial connection to events occurring prior to or within the statutory period. Even in the absence of the pervasive limitations problem, the great number of disparate episodes involving many different alleged co-conspirators required that the *Kotteakos* instruction be given. *See United States v. Bertolotti*, – F. 2d – (2nd Cir. Nov. 10, 1975) (Slip Op. at 12-16). Considering the statute of limitations issue, such instruction was critical.

91. (Cont'd.)
(4205a-4206a); Def. Req. Final Inst. 4 (4077a-4078a); 7 (¶ "Third") (4080a); 38 (4102a-4103a); and 39 (4103a-4104a). The trial court failed to give these instructions despite having informed defense counsel that he would give Def. Req. Final Inst. 7 (¶ "Third"), 38 and a portion of 39 (3784a-3785a, Tr. 14,003-04; 3793a, Tr. 14,015).

2. The Court Refused to Instruct the Jury to Determine "Scope and Purpose" and to Consider It Separately as to Each Defendant.

Because of the statute of limitations problem and the fragmented nature of the prosecution's evidence, defendants requested an instruction focusing the jury's attention on the "scope and purpose" of any conspiratorial agreement as to each defendant separately. Such an instruction was necessary to zero the jury in on the failure of the evidence to establish that the purpose and scope of the alleged conspiracy contemplated price-fixing within the statutory period. A defendant in a conspiracy prosecution may not be held liable for conspiracies not charged in the indictment or for the schemes of others to which the defendant was not "consciously" committed as a participant. *See Klein v. American Luggage Works, Inc., supra,* 323 F. 2d at 791; *United States v. Standard Oil Co., supra,* 316 F. 2d at 890. In submitting their proposed instruction,[92] defendants relied expressly on *United States v. Borelli,* 336 F. 2d 376 (2nd Cir. 1964), which was approvingly relied on by this Court in *DeCavalcante, supra,* 440 F. 2d at 1275, and

92. Defendants' requested instruction (Def. Supp. Req. 5, 4207a) read as follows:

> "Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party."

most recently in *United States v. Klein,* 515 F. 2d 751, 753 (3rd Cir. 1975).

In *Borelli,* the court held that where the issue had practical significance it was "essential" that the jury consider the issue of conspiratorial scope and purpose as to each defendant. (336 F. 2d at 384). The issue in that case was critical since the prosecution's evidence as to one defendant was concentrated in the pre-statutory period and the prosecution was seeking to hold that defendant responsible for acts of his former confederates occurring in the statutory period. Even though the trial court had given a *Kotteakos* instruction, its final charge was considered prejudicially deficient in failing to focus the jury on whether the later acts of others were in furtherance of a specific conspiratorial purpose to which the particular defendant had knowingly assented (336 F. 2d at 382, n. 1, 385-86):

> ". . . [W]e hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants" (336 F. 2d at 386, n. 4).

The convictions in *Borelli* were reversed and a new trial granted because the trial court failed to charge on the necessity for determining the "scope" of the alleged agreement as to each defendant.[93]

93. The *Borelli* reasoning has been approved not only by this Court in its *DeCavalcante* and *Klein* decisions, but in pattern jury instructions and model statutes. *See United States v. Johns-Man-*

The issue of "scope and purpose" was extremely significant in this case. As in *Borelli*, the limitations bar was jeopardized by the concentration of evidence in the pre-statutory period. Thus, it was essential that the question of scope and purpose be considered individually as to each defendant in determining whether, for example, that defendant was party to a conspiratorial purpose extending into the statutory period.[94] Similarly, the jury was required to consider whether a defendant's participation in one narrow episode, such as Texas Gypsum, was confined in scope and purpose to that episode or, instead, comprehended other purposes and, if so, what those other purposes were. The failure to focus the jury on such issues in the context of this case was prejudicial error.

3. The Jury Was Not Permitted to Consider Evidence of Vigorous Price Competition as Bearing on the Issue of Withdrawal and Abandonment From an Alleged Price-Fixing Conspiracy.

Where an alleged conspiracy is finite in scope and time, it is terminated with the accomplishment of its objective and may not be deemed to have continued thereafter. *Grunewald v. United States, supra*, 353 U. S. at 397-99.

93. (Cont'd.)
ville Corp., Cr. 21-118 (E. D. Pa. 1962), *ABA Jury Instructions in Criminal Antitrust Cases*, 482 at 512-14 (1965); *see also* Wechsler, *et al.*, "The Treatment of Inchoate Crimes in the Model Penal Code of the A. L. I.: Attempt, Solicitation and Conspiracy, Part II," 61 Colum. L. Rev. 957, 963-84, 988 (1961).

94. As an illustration, if defendants were assumed to have conspired with respect to the 1965 pricing decisions, the jury must still have focused on whether the objects of the conspiracy were achieved with the implementation of those decisions, or whether each defendant agreed upon some other purpose or object extending beyond those decisions and continuing into the statutory period.

Even where a continuing conspiracy is proven, however, each defendant who has completely disassociated himself from the conspiracy through some affirmative action prior to the commencement of the limitations period is entitled to acquittal. *Hyde v. United States*, 225 U. S. 347, 369 (1912); *United States v. Chester*, 407 F. 2d 53, 55 (3rd Cir. 1969), *cert. denied*, 394 U. S. 1020 (1969). Withdrawal is accomplished by the "communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *United States v. Borelli, supra*, 336 F. 2d at 388.

Defendants' requested instruction on the withdrawal issue recognized that affirmative action was required, but left it to the jury to determine whether evidence such as the resumption of vigorous competitive behavior was sufficient to conclude that the requisite affirmative action had been taken (Def. Req. Final Inst. 25, 4094a).[95] The trial court rejected the defense request and improperly narrowed the jury's consideration to just two technical, precise methods of communicating withdrawal:

> *"To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking* so they understand they can no longer expect his participation or acquiescence, *or he must make disclosures of the illegal scheme to law enforcement officials"* (3898a, Tr. 14,876-77, emphasis added).

In an antitrust case, resumption of competitive behavior should be sufficient to raise at least a jury issue as to

95. The relevant portion of defendants' request provided: "To withdraw from a conspiracy, a conspirator must take affirmative action. Resumption of competitive behavior, such as intensified price cutting or price wars, could constitute such affirmative action."

whether a defendant has "withdrawn" from an alleged price-fixing conspiracy in a manner reasonably calculated to reach alleged co-conspirators. *See Wall Products v. National Gypsum, supra*, 326 F. Supp. at 328. The relevant issue for the jury is whether withdrawal from a conspiracy is accomplished in a manner reasonably calculated to reach alleged associates and not the form or method by which withdrawal is communicated. In *Borelli*, the court held that a statement by the accused to one other co-conspirator, together with evidence of limited contact between the two, raised an issue for the jury to determine whether withdrawal had occurred.[96] Similarly, in *United States v. Goldberg*, 401 F. 2d 644, 649 (2nd Cir. 1968), *cert. denied*, 393 U. S. 1099 (1969), involving a conspiracy to violate the securities laws, a member of the brokerage firm cited for illegal activities, who left the firm before the statutory cutoff date, was held to have effectively withdrawn from the conspiracy even though he did not "affirmatively notify" each co-conspirator or disclose the scheme to law enforcement officials.

Other cases agree that "withdrawal" is not a narrow concept established only upon proof of precise affirmative acts. In *Buhler v. United States*, 33 F. 2d 382, 384 (9th Cir. 1929), the court refused to impose a strict definition of withdrawal, and held that circumstantial evidence of withdrawal was sufficient:

96. *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 958 (1959), notes:

> "However, in deciding that notice is insufficient unless given to every coconspirator, the courts have gone beyond the rationale of notification. It appears sufficient that the defendant reasonably expected his withdrawal to be communicated to the rest of his associates by those whom he informed; to require him personally to contact all members seems too harsh."

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and *we see no reason why the withdrawal should not be held susceptible to proof of the same character*. It might, of course, be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence" (*Id.* at 384, emphasis added).

Later, in *Marino v. United States*, 91 F. 2d 691, 698 (9th Cir. 1937), the court relied on *Buhler* and held that affirmative action constituting withdrawal could be shown "by conduct wholly inconsistent with the theory of continuing adherence."

The trial court's unduly narrow standards for establishing a "withdrawal" defense in effect directed a verdict on that issue against defendants despite abundant evidence of vigorous price competition after 1967. *See NBO Industries Treadway Companies, Inc., et al. v. Brunswick Corp., et al.*, 1975-2 CCH Trade Reg. Rep. ¶ 60,479 (3rd Cir. 1975). The injustice resulting from the erroneous instruction is highlighted by the finding of Judge Zirpoli in *Wall Products* that "by January 1, 1968, all defendants had *effectively* abandoned and withdrawn from the conspiracy" (*supra*, 326 F. Supp. at 328), which was based principally on evidence of widespread discounting after that date. Withdrawal from a Sherman Act conspiracy is effectively communicated through undercutting alleged conspirators' prices, increasing market penetration, and other actions inconsistent with the alleged conspiracy, or, at least, a jury could so find."[97] The refusal by the trial court to give a

97. G-P concentrated much of its defense on the facts that, as its distribution division acquired the responsibility for marketing gypsum products by 1967-68, its distribution centers were aggres-

proper instruction on withdrawal and abandonment is, in itself, grounds for reversal.

• • • • • •

The cumulative effect of the trial court's erroneous instructions on conspiracy law was to pretermit important defenses having substantial evidentiary support, and expose defendants to convictions for conduct other than the offense charged. Adequate instructions were particularly vital due to the stale character of the prosecution's evidence and the threatened avoidance of the statute of limitations. The trial court's attention was called to the antiquity of the prosecution's case early in the proceedings by defendants' pretrial motion to dismiss for excessive pre-indictment delay. Even then, however, the trial court failed to perceive the prejudice resulting to defendants from the prosecution's delay and the numerous trial problems posed by the concentration of the prosecution's evidence in the pre-statutory period.

---

97. (Cont'd.)
sively discounting prices to capture increased sales and its distribution center managers had independent pricing authority. G-P's requested "position" instructions on its theory of defense (4182a-4183a and 4192a-4194a, G-P Supp. Req.) were erroneously denied (3749a, Tr. 13,739). See *supra* at 51, n. 47. G-P's aggressiveness was clearly recognized and felt to be a serious competitive threat by all its competitors (see *supra* at 12-13). To counter the aggressive discounting G-P had fostered, National implemented a nationwide published price decrease on most gypsum board products in May, 1967 (2125ex-2126ex, NG 28-29). On the verification issue, USG stopped verifying prior to the statutory period, a fact known in the industry, while National stopped verification at the outset of the statutory period (see *supra* at 43-44). These and other facts were appropriate evidence of "withdrawal" which the jury should have considered, depending on what conspiratorial agreement, if any, it may have found.

B. Dismissal of the Indictment Is Required Because Defendants Were Seriously Prejudiced by the Prosecution's Excessive Pre-Indictment Delay.

Pre-indictment delay, once established, requires dismissal if the defendant further demonstrates actual prejudice resulting from the delay. Dismissal is required even though the delay was not intended to prejudice the defendants and even though the statute of limitations has not run. *See United States v. Marion*, 404 U. S. 307, 324-26 (1971); *United States v. Dukow*, 453 F. 2d 1328, 1330 (3rd Cir. 1972), *cert. denied sub. nom. Crow v. United States*, 406 U. S. 945 (1972). In *Marion*, the Supreme Court noted that where, within the statutory period, the prosecutor engages in pre-indictment delay which results in actual prejudice to defendants, the indictment must be dismissed on due process grounds. Misconstruing that legal standard, the trial court determined instead that, "a finding of prejudice to the defendants would have significance only if it had been determined that the Government had intentionally engaged in a pattern of tactically-motivated delay."[98] *United States v. United States Gypsum*, 383 F. Supp. 462, 470 (W. D. Pa. 1974) (62a). In short, the trial court imposed on defendants the additional burden of proving "bad faith" on the part of the prosecution.

The post-*Marion* cases establish that the trial court's standard of excessive pre-indictment delay was far too stringent to protect the due process rights of defendants.

---

98. The trial court's confusion as to the correct legal standard stemmed from its acceptance of the limited concession made by the government in *Marion* as the Supreme Court's holding. Contrast 383 F. Supp. at 464 with 404 U. S. at 324. As discussed in the text, *Marion* stands for a broader principle than the government in *Marion* was willing to concede.

This Court has held that prejudice to defendants is the "sole question," once a prolonged delay is shown. *United States v. Dukow, supra,* 453 F. 2d at 1330. *See also, United States v. Benson,* 487 F. 2d 978, 985 (3rd Cir. 1973); *United States v. Dabney,* 393 F. Supp. 529, 534-536 (E. D. Pa. 1975); and *United States v. Clark,* 398 F. Supp. 341, 350 (E. D. Pa. 1975). Similarly, in *United States v. Harmon,* 379 F. Supp. 1349 (D. N. J. 1974), the court granted a post-trial motion to dismiss and held that a delay of six years from the time of the events upon which the indictment was based, coupled with the death of a defense witness and the immunization of a government witness by the running of the statute of limitations, served to deny the defendant due process.

In *United States v. Wilson,* 357 F. Supp. 619 (E. D. Pa. 1973), *appeal dismissed and pet. for panel reh. denied,* 492 F. 2d 1345 (3rd Cir. 1974), *rev'd on other grounds* 420 U. S. 332 (1975), *aff'd on remand,* 517 F. 2d 1400 (3rd Cir. June 30, 1975), the district court applied the due process reasoning of *Marion* and granted a post-trial motion for dismissal where there was a pre-indictment delay of 16 months, during which a principal defense witness died. In the *Wilson* case, there was no showing or even any reference to intentional delay for tactical purposes. Other post-*Marion* cases recognize that a criminal case must be dismissed where there has been undue delay and a showing of prejudice, regardless of whether there was any intentional delay for tactical purposes. *E.g., United States v. Giacalone,* 477 F. 2d 1273, 1276 (6th Cir. 1973); *United States v. Erickson,* 472 F. 2d 505, 507 (9th Cir. 1973); *United States v. Stein,* 456 F. 2d 844, 848 (2nd Cir. 1972), *cert. denied,* 408 U. S. 922 (1972), *reh. denied,* 409 U. S. 898 (1972). The record in this case

establishes that there was both undue delay and acute prejudice.

1. The Prosecution Unduly Delayed Commencing This Prosecution.

There is no dispute that the prosecution deferred this prosecution. While there may be dispute over the prosecution's motive for delay, that controversy is irrelevant.[99]

In early 1965, after investigation by the prosecution's staff, two recommendations were made that grand jury proceedings be commenced to investigate evidence of alleged price-fixing and predatory conduct in the gypsum industry (Ev. H. DX Q-3, Q-6). No action was taken. Instead, the investigation was transferred to the Chicago field office where the Texas Gypsum charges and other matters were rehashed and investigated at length resulting in yet two more staff recommendations in 1965 and 1966 for grand jury action (118a-124a, Ev. H. 350-59; 124a-125a, Ev. H. 363; Ev. H. 369-376; Ev. H. DX Q-1, Q-2, Q-4, C-18). Again, no action was taken. The matter, along with another investigation by the Philadelphia field office, was then transferred to Washington, where a full investigation was conducted, still resulting in no action (Ev. H. 452-57; 127a, Ev. H. 469; 133a-134a, Ev. H. 483-

---

99. The trial court found that the prosecution had delayed but was satisfied that the delay was not "tactically-motivated" and was excused by "circumspect policy reasoning." 383 F. Supp. at 467. However characterized, the fact is that the prosecution delayed to await the outcome of the related *Wall Products* litigation and to obtain helpful guidance from Judge Zirpoli before framing charges (Ev. H. DX Q-28). In a related proceeding, the prosecution has conceded it deliberately delayed the indictment because of its desire to see how Judge Zirpoli would view the facts. See *infra* at 118.

87; Ev. H. 492-94; Ev. H. DX Q-13, Q-42, Q-43; Ev. H. DX F-19, F-20).

Two years after the commencement of the *Wall Products* litigation in January, 1967, the prosecution's investigation was transferred to San Francisco, where the *Wall Products* litigation was centered (Ev. H. 461, 498; Ev. H. DX Q-17). The San Francisco investigation resulted in, first, a staff recommendation in July, 1969 that prosecution be commenced without a grand jury "in view of the delay which would result and the possibility of statute of limitations problems" (Ev. H. DX Q-18) and, second, a staff recommendation in August, 1969 that a grand jury investigation "be conducted as soon as possible" (Ev. H. 614-15; Ev. H. DX Q-19A). These recommendations were killed because it was recognized that the *Wall Products* litigation was sufficient to protect the public interest and that it was inappropriate to commence a criminal prosecution based on verification so soon after the *Container* decision. 383 F. Supp. at 466-67 (Ev. H. DX Q-25, 26).

Shortly prior to October, 1970, a decision was finally made to convene a grand jury (Ev. H. 304-05, 307-08; Ev. H. DX A-2), but the prosecution delayed another ten months before doing so. Attached to a memorandum regarding the Antitrust Division investigation was a buckslip dated 10/29/70 from the Deputy Director of Operations stating: "Suggest you wait for decision of Judge Zirpoli in West Coast Case before framing any charges" (Ev. H. DX Q-28). The Division postponed even empaneling a grand jury until *after* Judge Zirpoli had ruled.

On March 18, 1971 Judge Zirpoli decided that defendants there, National, USG and Kaiser,[100] had lawfully engaged in price verification both to comply with the Robinson-Patman Act and to protect themselves from buyer fraud (326 F. Supp. at 308-315), and found a host of other industry practices to be lawful including those in the materials handling area. 326 F. Supp. at 296, n. 2. Although Judge Zirpoli inferred from circumstantial evidence that the three defendants in that case had engaged in a limited conspiracy, he expressly found that: "[B]y January 1, 1968, all defendants had effectively abandoned and withdrawn from the conspiracy. The Court therefore fixes the duration of the conspiracy to be from December 15, 1965 to January 1, 1968." 326 F. Supp. at 328.

100. Celotex, G-P, Andrew Watt, Colon Brown, and J. P. Nicely were not on trial before Judge Zirpoli.

Only after Judge Zirpoli held that the *Container* decision permitted price verification as it had occurred in the gypsum industry, was the Antitrust Division stimulated into action (Ev. H. DX Q-33, 36). Its action was taken with no new evidence of any substance. In fact, in December, 1971, based on the same alleged antitrust violation set forth in this Indictment some two years later, the prosecution filed a civil complaint for damages allegedly suffered by the government.[101]

In December, 1973 the Director of Operations of the Antitrust Division approved the filing of the Indictment against the individual defendants because of their claimed involvement in the December, 1965 price change and their

101. *United States v. United States Gypsum Co.*, Civil No. 71-2467 (N. D. Calif. filed 12/30/71) (Ev. H. DX A-3). The trial court in the present case stated that there was no evidence of undue delay in the grand jury investigation but failed to mention that the prosecution filed its civil complaint, based on the same allegations as its later indictment, just four months after its grand jury investigation had begun. In the government civil case, Judge Zirpoli held that the government was sufficiently apprised of the pertinent facts to reject its claim of fraudulent concealment and also held that the government was limited to one day's damages based on the filing of the civil complaint one day before the limitations period expired for the conspiracy which Judge Zirpoli had found ended by January 1, 1968.

knowledge or authorization of price verification—even though Judge Zirpoli had held the latter practice lawful and the Division itself had denied a staff recommendation for grand jury action, based on such involvement, four years earlier. Because of the lapse of time, this official candidly recognized: "With respect to most of the eleven [proposed individual defendants], the evidence falls short of identifying specific affirmative acts in furtherance of the conspiracy within the five-year statutory period" (Ev. H. DX Q-39). The Indictment was thus not returned until nearly a year *after* the five-year limitations bar applicable here ran on the civil conspiracy found by Judge Zirpoli, but within a few months after it appeared that the *Wall Products* cases would be settled and there would be no appellate review of Judge Zirpoli's holding that verification is lawful. That timing is no mere coincidence, since government counsel has conceded the prosecution's deliberate delay.

In a recent hearing in a criminal contempt proceeding against defendants and other gypsum industry members filed by the prosecution on the day the Indictment here was returned, government counsel conceded that, "it was a deliberate decision that we did not undertake a criminal investigation back in 1969," because:

> "It appeared important because of the closeness of the facts, it appeared important to see how the Judge would view those facts, in making a determination as to whether to proceed criminally." *United States v. United States Gypsum*, Crim. No. 1042-73 (D. D. C., filed December 27, 1973) (Transcript of Proceedings, October 17, 1975, pp. 74-75).

By its own admission, the prosecution purposely delayed acting on facts known to it which were central to this prosecution and, instead, awaited the outcome of the protracted *Wall Products* litigation. Thus, dismissal under the *Marion* standard is required, since defendants were actually prejudiced by this delay.

2. Defendants Suffered Actual Prejudice as a Consequence of the Prosecution's Pre-Indictment Delay.

Initially, the lower court dismissed defendants' pretrial contentions of prejudice as "moot" (62a). When the trial itself confirmed defendants' forecast of extreme prejudice, the trial court nonetheless swiftly denied the renewal of the motion to dismiss (Tr. 8141).

As discussed above, the prosecution concentrated on old, pre-statutory evidence. The prosecution sought to prove stale charges by arguing inferences from the mere fact of contacts between representatives of defendants. Persons involved in those contacts were vital to each defendant's ability to deny the inferences which the prosecution asked the jury to draw. However, many such key witnesses were unavailable because of death or faded recollection resulting from the prosecution's delay. Thirty-six witnesses with first-hand knowledge of events relied upon by the prosecution died before trial. Prosecution witnesses referred to these dead witnesses about 460 times. Twenty-six of the deceased witnesses are identified on 376 of the prosecution's exhibits. Ten dead witnesses were referred to by name in the prosecution's closing arguments on over a hundred occasions.[102]

102. Over 114 witnesses who had direct knowledge of incidents relied upon by the prosecution had died, resigned, or retired during the period of pre-indictment delay. The presumption of innocence warrants a presumption that their testimony or recollection would have been favorable to the defendants. A complete listing of all deceased witnesses and individuals, many of whose recollections of the distant events relied upon by the prosecution had faded, appears in appendices "A" and "B" at the end of this section, pp. 138-43.

One key witness, lost to defendants during the pre-indictment delay, was Melvin Quayle, who died a few months before trial. He was painted as an alleged conspiratorial emissary of the defendants in 1960 by the testimony of Claude Huckleberry of Texas Gypsum (*see supra* at 87-88). Quayle had denied this in his grand jury testimony (985a-986a, Tr. 2812; 991a-992a, Tr. 2819), but the force of his denial to the jury passed with his death. The significance of the Texas Gypsum episode involving Huckleberry and Quayle cannot be doubted since the prosecution alluded to it over 80 times in closing argument.

The Huckleberry-Quayle meeting is only one of dozens of similar examples of trial prejudice. The prosecution introduced evidence of contacts between Simpson of Republic Gypsum, who was hostile to defendants, and Miller of Celotex, who usually verified for that company (691a-692a, Tr. 1982-83), and John Brown of National (620a-623a, Tr. 1873-75; 628a-629a, Tr. 1882-83; 633a, Tr. 1888; 823a-824a, Tr. 2297-2301). Miller, who died in 1974 and would have made "an excellent witness for the defense" (157a-159a, Ev. H. 809-11), was referred to twenty-eight times by the prosecution in closing argument. John Brown, also now dead, was referred to thirty-four times. Since January 1, 1968, the date Judge Zirpoli held that the prosecution had sufficient notice to proceed with its civil case, twenty-eight key individuals employed by defendant corporations have died. (See App. A *infra* at 138-139.)

Defendants also suffered actual prejudice from their inability to explain the purposes of alleged conspiratorial meetings between persons who were deceased at the time of trial.[103] Further, the prosecution introduced hundreds

103. See, e.g., 549ex-550ex, GX 469 (meeting between John Brown of National and Miller of Celotex); 1649ex, GX 1937 (meeting between John Brown of National and Ross of Flintkote; and

of exhibits written by or referring to persons now dead.[104]

The trial record conclusively established that defendants suffered actual prejudice due to the prosecution's decision to delay any indictment. Under *Marion* and its progeny, defendants were entitled to a dismissal of the Indictment on due process grounds.

3. An A Fortiori Case for Dismissal Is Presented Under the Marion Rationale Because the Prosecution's Delay Pre-Dated the Applicable Limitations Period.

In *Marion*, the Supreme Court observed that, although the applicable statute of limitations is the primary guarantee against bringing overly stale criminal charges, even indictments brought *within* the applicable statute must be dismissed if there is unreasonable pre-indictment delay which caused "actual prejudice" to the accused. Of course, the Court in *Marion* was confronted with a non-conspiracy case in which all the relevant acts of the defendant were well within the applicable statute of limitations. As noted, in conspiracy cases, the protection of even the statute of limitations is frequently threatened by the prosecution's tactic of alleging a continuing agreement of indefinite duration but formed well prior to the statutory period. *Grunewald v. United States*, *supra*, 353 U. S. at 391-406. Thus, in this case, the pre-indictment delay of

103. (Cont'd.)
1665ex, GX 1979 (meeting between John Brown of National and Collins of Celotex).

104. See, e.g., Nabors' memo to Chandler of June 6, 1961 regarding "Competitive Gypsum Board Warehouse Situation-El Paso" (1689ex, GX 2123). Nabors' intimate knowledge regarding market conditions concerning Texas Gypsum was aptly described in the evidentiary hearing as "irretrievable" (Ev. H. 766), since Nabors is dead. Chandler, also deceased, "was a key link in the decision-making process for these [allegedly predatory] competitive responses" to Texas Gypsum (Ev. H. 767).

the prosecution, which pre-dated the limitations period, coupled with the heavy concentration of the prosecution's evidence in the pre-statutory period, operated to deprive defendants of the protection of the statute of limitations as well as their due process right to be brought to trial without an intervening period of excessive pre-indictment delay.

Under these circumstances, the prosecution's pre-indictment delay constitutes an alternative basis for reversal of the judgments below and dismissal of the Indictment.

C. The Jury Verdict Was Contaminated by Consideration of Incompetent, Inflammatory Hearsay Evidence.

During the trial itself, defendants repeatedly challenged the admissibility of the stale and unconnected episodes on which the prosecution relied. As alternatives to their motions for acquittal based on the insufficiency of the evidence, defendants moved unsuccessfully to strike the evidence regarding Texas Gypsum in 1960, Republic Gypsum in 1970, Michigan pallet usage in 1966 and 1971, and other such categories of evidence.[105] The prejudicial error in submitting each of these categories of evidence to the jury requires reversal.

The trial court's basic philosophy in admitting evidence was to receive even irrelevant matters "for what may be, some day, a review by the wise men in the east" (Tr. 6528-29). This approach led repeatedly to the promiscuous admission of prejudicial evidence through an abroga-

105. At the close of the evidence, defendants' renewed motions for judgments of acquittal, or, alternatively, to strike certain evidence, were denied as untimely even though they had been promptly filed (3747a, Tr. 13,756). After the jury verdict had been coerced, the trial court immediately declared to counsel its intention to deny motions for acquittal (4050a-4052a, Tr. 15,227-28).

tion of the hearsay rule and the related requirement of competency.

1. The Requirements of the Co-Conspirator Declaration Exception Were Ignored by the Trial Court.

Inadmissible, incompetent hearsay was improperly received. A particularly prejudicial example was the testimony elicited from prosecution witness Claude Huckleberry of Texas Gypsum, concerning visits by Quayle and Hardin of American Gypsum Company, a non-defendant single plant producer, in 1960-61 and by Malcolm Meyer of Bestwall in 1963. Huckleberry testified about certain out-of-court statements these men purportedly made to him. As has been argued in other portions of this brief (see *supra* at 87-89), the Quayle-Hardin-Meyer hearsay was particularly damaging since it was the only evidence directly suggesting that defendants were engaged in any type of illegal combination.[106] These statements were not properly admitted as co-conspirator declarations because there was no substantial independent evidence to connect any of these men to any alleged price-fixing conspiracy involving defendants. *Dutton v. Evans*, 400 U. S. 74, 81 (1970); *Wong Sun v. United States*, 371 U. S. 471, 491 (1963); *United States v. Rodrigues*, 491 F. 2d 663, 666 (3rd Cir. 1974); *United States v. DeCavalcante*, 440 F. 2d 1264, 1272 (3rd Cir. 1971).

106. Defendants had a continuing objection to any hearsay improperly admitted under the co-conspirator exception to the hearsay rule (Tr. 606-08). Prior to Huckleberry's testimony about Hardin and Quayle, defense counsel objected to the admissibility of this evidence (Tr. 2690-92; 942a-944a, Tr. 2722-23). Later, defendants moved to strike this testimony, which motion was denied (Tr. 10,037).

The only evidence which the prosecution can fairly claim "connected" Hardin and Quayle to an alleged conspiracy or made them "agents" of the defendants was: (1) that American Gypsum joined the Gypsum Association in October, 1960 (1768ex-1769ex, GX 2429); (2) that Quayle and Bear of USG met sometime in 1960 to discuss buy-sell arrangements and a license agreement between American and USG (565a-568a, Tr. 1553-56); and, (3) that at some unspecified time, A. Meyer of Bestwall occasionally verified reports of price concessions with Quayle (1444a-1445a, Tr. 5449-50; 1449a, Tr. 5456).[107] This evidence was quite insufficient to provide the requisite "connection" by proof *aliunde* for the receipt of Huckleberry's hearsay testimony. The judge allowed the evidence apparently because the out-of-court statements were deemed connected by their own content—a classic bootstrap operation condemned by the Supreme Court, *see Glasser v. United States*, 315 U. S. 60, 74-75 (1942). This contravened the requirement that "connection" be shown by substantial *independent* evidence. *See Krulewitch v. United States, supra*, 336 U. S. at 453 (J. Jackson concurring); *United States v. DeCavalcante, supra*, 440 F. 2d at 1272-73, 1275.[108]

107. The only evidence allegedly connecting Malcolm Meyer (who was employed by Bestwall until 1963—34ex, GX 7) was that: (1) he was President of the Gypsum Association in 1960-61 (919a-920a, Tr. 2642-43); (2) he asked Huckleberry to join the Gypsum Association (926a-927a, Tr. 2658-59); (3) the Gypsum Association favored rail delivery (920a-922a, Tr. 2646-47); and (4) he verified maybe once or twice with USG and National (914a-915a, Tr. 2607-08). This evidence did not show that Meyer was an agent of defendants in furtherance of any alleged price-fixing conspiracy when he visited with Huckleberry in 1963.

108. In the final charge, the trial court failed to include any reference to the requirement that there must be independent evidence to connect any out-of-court statement to any alleged conspiracy involving defendants (3895a-3896a, Tr. 14,873). Defendants' request that such a charge be given was denied (Def. Supp. Req. 4, 4206a).

The prejudicial impact of the Huckleberry hearsay cannot be overstated. The prosecution's case rested heavily on it, as appears in the closing argument statement: "Texas Gypsum—that is where it started" (Tr. 13,807). The inflammatory appeal of suggesting to the jury that the "big boys" could kill the "little" producer cannot be discounted. Even in a case otherwise free from error, this single incorrect ruling would require reversal.

2. The Trial Court Paid No Heed to the Requirements of the Business Record Rule.

At trial, the prosecution was permitted to introduce any document as a business record so long as any witness testified that the document was subpoenaed from the files of his company. The trial court stated, "You can assume it was kept in the ordinary course of business" (Tr. 3965). This grossly deficient "standard" allowed the prosecution to rely on obscure hearsay unqualified by any requirement of competency either as to the document's author or the declarant, if other than the author.[109]

Two examples suffice to demonstrate the gravity of the trial court's error in admitting hearsay documents. Admitted as a business record was an undated, anonymously written document from the files of Johns-Manville Corporation ("JM"), a nonparty, containing credit information about the corporate defendants and others, obtained by some unidentified source or sources sometime in

109. A document qualifies as a business record only when (a) a competent witness can authenticate that (b) the record was made in the regular course of business, and that (c) it was part of the regular course of business to make such record. *Rivers v. Union Carbide Corp.*, 426 F. 2d 633, 637 (3rd Cir. 1970).

1969 and 1970 (1111ex-1115ex, GX 1015). A prosecution witness testified that he was first employed by JM in June, 1971, after the document was written, that he was not the custodian of the document in question, that he did not know the date or author of the document or whether it was prepared on or about the dates referred to therein (Tr. 7578-80). Despite the clear lack of foundation, the witness' bare assertion that the document was made and maintained in the ordinary course of business (Tr. 7577-78) was deemed sufficient to qualify the JM document as a "business record."[110] The trial court admitted the document, over defense counsel's objection (Tr. 7581), together with other JM documents, and improperly instructed the jury to determine whether those documents were probative of the conspiracy charged (Tr. 7588-90; *see also* Tr. 7523-25).[111]

The JM document was highly prejudicial to defendants, because of the prosecution's characterization of it. During closing argument, the prosecution maintained that the JM document showed "a continuing checking and exchange on extended credit terms [by the corporate defendants] deeply into the conspiratorial period" (Tr. 13,994-95; see also Tr. 13,964-65; 3850a-3852a, Tr. 14,811-

110. On three occasions, the prosecution used virtually the same procedure to qualify other documents from Flintkote, Fibreboard and Johns-Manville (Tr. 3933-94; Tr. 7507-29; Tr. 7543-75 and Tr. 7590-608).

111. In *United States v. American Radiator & Standard Sanitary Corporation*, 433 F. 2d 174, 197 (3rd Cir. 1970), this Court upheld the trial judge's refusal to admit certain reports as business records in part because the reports were based on information supplied by sources whose "trustworthiness" had not been established either by the documents or by oral testimony. There was even more reason to exclude GX 1015 in this case because who obtained the information or how it was obtained was never identified; therefore, it was impossible to evaluate the trustworthiness of the source(s).

12).[112] Thus, the admission of this undated, anonymous, and ambiguous document given to the prosecution by a nonparty was used improperly to convict defendants, including those defendants who had previously ceased verification.

An equally gross error occurred during the cross examination of defendant Andrew Watt. The prosecutor offered into evidence a document (173ex-178ex, GX 121) which purported to be an exchange of memoranda written in late 1964 between two West Coast employees of USG, neither of whom testified at trial, suggesting that Watt might be asked to contact a competitor. Watt twice testified that he had never before seen the document in the regular course of business (3317a-3319a, Tr. 12,886-87). The prosecutor acknowledged his inability to qualify the document as a business record, but the trial judge then sought himself to qualify the document by asking if it was the "kind of document that was prepared and maintained in the ordinary course of business by United States Gypsum?" (3317a-3319a, Tr. 12,886-87). Watt stated that the document seemed to be "a series of memoranda that deal with a number of situations and they seem to be writing back and forth to each other to find out information." The trial judge then demanded in the jury's presence: "Is that what would be done[?]." Watt replied: "I think that is normal in business, but as I said, I did not see these documents in the normal course of business" (3318a-3319a, Tr. 12,887). The document was then erroneously admitted over defense counsel's objection (3318a-3319a, Tr. 12,887-88), even though the only basis was the testimony of a witness who

112. GX 1015 does not indicate that there was any exchange of extended credit terms or any other type of information among the corporate defendants in 1969 or 1970. However, its language is ambiguous, thus demonstrating the importance of having the source(s) of the information identified and qualified before receiving such statements for their truth.

had never seen it in the course of business and who was not even competent to identify where it came from.

The prejudice of this error also was great. The exhibit appeared to be an inquiry by one regional employee of USG to another, asking, "Can Watt explore and let them [apparently Fibreboard] know the implication of their [trucking] action?". Watt had denied that this matter had been raised with him (3320a-3321a, Tr. 12,890), and the prosecution called neither of the two employees as witnesses, undoubtedly because both had previously given sworn testimony in *Wall Products* consistent with Watt's denial that this document had ever been brought to his attention. Compounding the error and completely disregarding his professional responsibility, the prosecutor declared during final argument that the document proved that Watt had been asked to contact Fibreboard. When Watt's counsel objected to this serious misstatement, the trial court not only erroneously overruled the objection, but also prejudicially instructed the jury: "the fact that Mr. Bartlit [Watt's counsel] states it misstated the record doesn't mean that it did" (3844a-3845a, Tr. 14,749-50).

The laxity of its standards of proof for the admissibility of any type of document produced from corporate files led to the court's wholesale receipt, to defendants' prejudice, of hearsay documents as "business records" when no adequate foundation for their admission had been established [113] (Tr. 621-22; Tr. 833-35; Tr. 1175-77; Tr. 3244-47; Tr. 4056; Tr. 7338; Tr. 7476-77; see also, *supra* at 126, n. 110).

---

113. The trial court also erred in receiving calendars and diaries into evidence without any explanation of the notations appearing thereon, and then permitting the prosecutor to argue that these proved actual phone calls and meetings and further that the purpose of such presumed contacts was improper. In the absence of incriminating circumstances supported by evidence, opportunity contacts, even if they occur, cannot be presumed unlawful. *See Venzie Corp. v. U. S. Mineral Products Corp., supra,* 1975-2 Trade Cases, ¶ 60,481 at 67,135; *United States v. Kompinski, supra,* 373 F. 2d at 434.

3. The Prosecution Was Improperly Permitted to Adduce Inflammatory, Prejudicial Evidence of Past Antitrust Complaints and Litigation.

Over vigorous objection, the trial court allowed the prosecution to bring to the jury's attention references to prior lawsuits and complaints to the government which involved some of the defendants. (See, e.g., Tr. 1253-56; 760a-761a, Tr. 2080-81; 1032a-1033a, Tr. 2896-97; 1035a-1037a, Tr. 2900-02; 1685a-1687a, Tr. 6157-62). This evidence had no probative value. Mere complaints of suspected wrongdoing cannot substitute for proof of criminal behavior. *Hurst v. United States,* 337 F. 2d 678, 681 (5th Cir. 1964); III Wigmore on Evidence § 980(a) (3rd Ed.). The introduction of such evidence is clearly prejudicial because it tends to confuse the jury and induce it to believe defendants are guilty of violating the law because they have been accused and investigated in the past.

Such references prejudicially suggested to the jury that defendants had a "history" of antitrust violations. Although the prosecution argued erroneously that the existence of the *Wall Products* litigation was relevant to explain that the absence in its own case of incriminating evidence in the statutory period was due to a "cover-up" to avoid civil liability (Tr. 438-40; Tr. 1034-39), the trial court admitted it for an even more improper reason. The trial court first ruled that the prosecution could not refer to the *Wall Products* litigation (Tr. 438-40). However, betraying its fundamental hostility to defendants' Robinson-Patman Act reasons for their verification contacts, the trial court threatened that if defendants subsequently raised the issue of compliance with the Robinson-Patman Act, "all of this [*Wall Products* litigation evidence] goes in" (Tr. 1040-43). After that purpose was later established

through the prosecution's own witnesses, the court allowed references to questions on the *Wall Products* litigation (1685a-1687a, Tr. 6157-62).

The prosecution's claim that evidence of *Wall Products* was probative of a motive for concealment in the statutory period was irrelevant to the conspiracy charged. In *Grunewald v. United States*, 353 U. S. 391, 401-402 (1957), the Supreme Court expressly rejected the government's contention that the continuation of a conspiracy into the statutory period may be inferred from acts of concealment. It was fundamentally unfair and prejudicial to defendants to permit the absence of incriminating evidence in the statutory period to be used as an excuse to place before the jury evidence of other civil antitrust litigation.[114] Since the evidence pertaining to *Wall Products* was not probative of any relevant issue, its admission was error. *See United States v. Klein*, 515 F. 2d 751, 755-57 (3rd Cir. 1975); *United States v. Gray*, 468 F. 2d 257, 260-61 (3rd Cir. 1972).

Moreover, whether or not the prosecution's evidence of past complaints and litigation had some minimal relevance, it still should not have been admitted because its prejudicial character far outweighed any conceivable probative value. Admitting such evidence is tantamount to proving the charged offense by citing past offenses, except that in this case no past finding of criminal liability had ever occurred. Even civil antitrust cases have held such evidence to be unduly prejudicial and thus inadmissible. *See International Shoe Machinery Corp. v. United Shoe Machine Corp.*, 315 F. 2d 449, 459 (1st Cir. 1963),

114. The unfairness here is highlighted by the facts that not all defendants were parties to the *Wall Products* litigation and that *Wall Products* exonerated most of defendants' business practices, including verification, and held that the limited conspiracy found there had terminated by the end of 1967. Thus, *Grunewald* is a close precedent condemning the prosecution's tactic.

cert. denied 375 U. S. 820 (1963), approvingly cited by this Court in *Belmont Industries, Inc. v. Bethlehem Steel Corp.*, 512 F. 2d 434, 439, n. 19 (3rd Cir. 1975). *See also United States v. Oregon State Medical Society*, 95 F. Supp. 103 (D. Ore. 1950), *affirmed* 343 U. S. 326 (1952); *Banana Distributors, Inc. v. United Fruit Co.*, 1962 Trade Cases ¶ 70,368 at 76,529 (S. D. N. Y. 1962). *A fortiori*, in a criminal case, there is even a greater reason to exclude such unduly prejudicial evidence of past legal involvement. *See United States v. Klein, supra*, 515 F. 2d at 755-56; *United States v. Gray, supra*, 468 F. 2d at 260-61.

D. The Trial Court's Partiality for the Prosecution Necessarily Prejudiced Defendants.

As shown above, the court's disbelief in defendants' Robinson-Patman position was manifest in prejudicial comments before the jury (*supra* at 48-62). Similar erroneous evidentiary rulings favored the prosecution, as did the court's final charge, which either ignored or overruled key defenses to the Indictment.

The record here discloses "many, many instances which may very well have led the jury to believe that the trial judge regarded the defendants as guilty of the offense charged, and that the verdict of the jury should be to that effect." *United States v. Standard Oil Co.*, 316 F. 2d 884, 896 (7th Cir. 1963). *See also United States v. Fry*, 304 F. 2d 296, 298 (7th Cir. 1962). In *Standard Oil*, antitrust convictions were reversed, *inter alia*, for numerous errors, the cumulative effect of which constituted a departure by the trial court from an "attitude of impartiality" and from its role as the "governor of the trial for the purpose of assuring its proper conduct." 316 F. 2d at 895. Agreeing that such a "tilt" toward the prosecution may be unintended and that an antitrust trial may be an "exhausting

experience," the reviewing court held neither factor sufficient to excuse the absence of essential fairness to the defendants and their case.

1. The Final Instructions Clearly Favored the Prosecution in Their One-Sidedness.

The trial court chose the risk of serious error by giving extemporaneous instructions following a four-month trial involving mixed legal and factual issues of considerable sophistication and complexity.[115] The informality of the final charge induced more than the grave errors already discussed; the colloquial terms used by the court conveyed to the jury a partiality to the prosecution.

By way of example, the court's comments regarding the Sherman Act are couched in 4th of July oratory, stating that the purpose of the Sherman Act was to protect the free enterprise system which, the court declared, "frees the spirit and loosens men's creative energies," mentioning in the same breath, "freedom of religion and the press, speech or assembly" (3892a-3893a, Tr. 14,869). The court warned the jury, "The alternative to that is control by a monolithic bureaucracy" (3891a-3892a, Tr. 14,868). He concluded by stating, "It is for these reasons that I believe the charge of raising, fixing, maintaining and stabilizing prices is a most serious one and must be seriously considered by you" (3892a-3893a, Tr. 14,869). The cumulative import of such comments was to declare improperly to the jury that failing to convict defendants might "produce rigid controls, which lead, eventually, to the demise of the free enterprise system" and thus to a "monolithic

115. By not having a written charge, the court could not satisfy a jury request for repetition of some charges until the next day (see *supra* at p. 52, n. 48). The court, in ruling on defense requests to charge, obviously did not know what he would be charging (See, e.g., 3751a-3752a, Tr. 13,763), and thus undoubtedly failed to comply with the spirit, if not the letter, of Rule 30, F. R. Crim P. This point is more fully developed in USG's separate brief.

bureaucracy" (3892a-3893a, Tr. 14,868-69). In telling contrast, the trial court said nothing about the purpose and importance of the Robinson-Patman Act.

A second illustration of the one-sided charge is the repetitive instructions pertaining to circumstantial evidence.[116] Although the court told defense counsel that he would instruct the jury "that, in some instances, circumstantial evidence is more reliable than the direct evidence, *and, in other cases, it isn't*" (3754a, Tr. 13,766, emphasis added), the trial court failed to do this. Instead, the instruction actually given consisted of an illustration of how circumstantial evidence could be much better than direct evidence (rabbit tracks in the snow) (3867a-3869a, Tr. 14,837-39). The court never instructed the jury, as represented, that in some cases direct evidence was better.

The trial court's final charge amply communicated its strong philosophical leanings in favor of the prosecution. Only a court insensitive to the defense could have illustrated antitrust law by the misleading folk expression that "Macy's can't tell Gimbels" or agency law by inaccurate and prejudicial illustrations referring to "Mr. Brown's chauffeur" and "Mr. Nicely's gardener" (3877a-3878a, Tr. 14,850; 3904a-3905a, Tr. 14,887). As shown next, the trial court's leanings were also expressed to the jury as the evidence was being received.

116. Because the prosecution's evidence was essentially circumstantial and the jury was thus required to draw inferences, defendants requested several instructions on circumstantial evidence and inferences. Although the trial judge stated that he would give certain of these instructions, he failed to do so (3749a, Tr. 13,759; 3754a, Tr. 13,766). His passing reference to drawing inferences was patently inadequate (3861a-3862a, Tr. 14,828-29). See Def. Req. Final Inst 49-54 (4112a-4115a); 69 (4126a) and Def. Supp. Req. 14 (4211a), 22 (4214a).

2. The Trial Court Was Not Evenhanded in Its Control of Witness Examinations and Commented Prejudicially on Defendants' Evidence.

In contrast to the wide latitude afforded the prosecution in its witness interrogations,[117] the trial court unduly restricted defendants in their cross-examinations of prosecution witnesses.[118]

Perhaps the most significant restriction occurred in the cross-examination of McCaskill, a former G-P employee and prosecution witness, who was kept on direct examination for almost four days. As previously noted, *supra* at 76, McCaskill was a key prosecution witness on the circumstances leading to the May 1, 1969 price increase announcement, which the prosecution asserted was conspiratorial. The prosecution was allowed to conduct a nearly word-for-word examination concerning certain internal G-P documents written after USG's January 31, 1969 announcement of that price increase. When G-P counsel sought to cross-examine the witness about several other contemporaneous internal documents directly expressing G-P's uncertainty as to whether the May 1, 1969 list price increase would be effective, the trial judge ruled that defense counsel would be permitted to read to the jury and question the witness about *just one document* (Tr. 4857-58, emphasis added). G-P counsel had sought to examine

117. See 515a-516a, Tr. 1293-94; Tr. 1489-90; 628a-631a, Tr. 1883-86; 703a-707a, Tr. 1998-2002; 711a-712a, Tr. 2007-08; 716a-718a, Tr. 2014-15; 886a-888a, Tr. 2525-27; Tr. 2531-32; 898a-901a, Tr. 2543-45; 1299a, Tr. 4477; Tr. 5128; Tr. 5131; 1390a-1391a, Tr. 5152-54; 1391a-1392a, Tr. 5158-59; 1443a-1444a, Tr. 5448-49; 1445a, Tr. 5451; Tr. 5464; 1909a-1910a, Tr. 7072; Tr. 7279-80. As demonstrated *infra* at 144-62, the prosecution quickly recognized the wide latitude afforded it and thereafter engaged in serious misconduct.

118. See, e.g., Tr. 4675-80; Tr. 4689; Tr. 4696; Tr. 4803-05; Tr. 4833; Tr. 4864-66; 1433a-1434a, Tr. 5374-75.

on 21 documents, each of which was exculpatory and non-repetitive (G-P 226-29; G-P 232-48).

Such undue restrictions on cross-examination deprived defendants of their right to effective cross examination guaranteed by the Sixth Amendment confrontation clause. *Pointer v. Texas*, 380 U. S. 400 (1965); *United States v. Morris*, 485 F. 2d 1385 (5th Cir. 1973). Although a trial judge has some discretion over the scope of cross, that discretion becomes operative only after a defendant has had the opportunity for a full and fair cross examination. *Dixon v. United States*, 333 F. 2d 348, 353 (5th Cir. 1964).

Another example of the trial court's crippling of the defense case came in the direct examination of defendants' expert economic witness, Dr. Cyert. In a circumstantial evidence antitrust case, economic evidence is of primary importance in considering whether a violation has occurred. *Continental Baking Co. v. United States*, 281 F. 2d 137 (6th Cir. 1960). The uncontradicted evidence of "rampant price competition" presented by defendants' expert was thus of paramount importance. (See *supra* at 15-17). The trial court improperly impeded the development of Dr. Cyert's testimony by limiting the scope of defendants' direct examination of him, thus precluding the defense from effectively presenting to the jury a thorough demonstration of defendants' price competition throughout the statutory period (3091a, Tr. 12,087; 3095a-3096a, Tr. 12,093-94).

In contrast, the prosecution was allowed to cross-examine Dr. Cyert so broadly that irrelevant and inflammatory matter was suggested to the jury by the prosecution's questions. For example, the prosecutor was even permitted to question Dr. Cyert about the electrical price fixing cases in the early 1960's in a transparent effort to

suggest to the jury that pricing studies similar to those conducted by Dr. Cyert had also been considered in those cases, but that price fixing had nevertheless been found (3135a-3136a, Tr. 12,243-46). This prosecutorial ploy sought to make up for the deficiencies of its own case by seeking nutrition from other irrelevant, prejudicial antitrust proceedings. Moreover, as was pointed out by defense counsel, the pricing studies in the electrical equipment cases had been put in some plaintiff's lawyer's brief and were never even considered by a trier of fact (Tr. 12,266). Defense counsel also stressed that presenting this material to a Pittsburgh jury was highly prejudicial since the electrical equipment cases had received great publicity in Pennsylvania, where they were filed, and particularly because one major Pittsburgh corporation was a defendant (Tr. 12,264-65).[119]

The prejudicial impact of this uneven handling of the defense and prosecution examinations of Dr. Cyert was severely compounded by the trial court's own denigration of Dr. Cyert's testimony before the jury. One example of the court's intrusion of its views occurred when, in the midst of defense counsel's direct examination, the court asked Dr. Cyert the following question:

> "THE COURT: As to all these charts that you put up, have you yourself, or has anybody else to your knowledge, ever made a similar study where there was price fixing?
>
> In other words, what are you comparing it to?" (3108a-3109a, Tr. 12,126).

This inquiry led to the following questioning by the court:

119. Defense counsel also reminded the court that one of the jurors (later elected foreman) was an electrical engineer (Tr. 12,265) whose job responsibilities included the purchase of electrical equipment (Tr. 167).

> "THE COURT: Purely theory? There is no basis? You have no basis for comparison as to any of the—as a basis for any of your conclusions then?" (3109a, Tr. 12,127).

The disparaging, belittling tenor of the court's inquiries clearly conveyed its view that Dr. Cyert's study should be given little or no weight. Not risking his point to inference, however, the trial court thereupon turned to the jury and instructed it that it was to remember that Dr. Cyert's testimony and conclusion were "based on theory and not any comparison with another situation where there was actual price fixing" (3109a, Tr. 12,127).

The trial court's unbridled disparagement of Dr. Cyert and his work was inexcusable. Dr. Cyert and his staff of expert economists had studied actual prices and actual pricing behavior in the marketplace and not just economic "theory." Dr. Cyert's study went directly to the core of the government's charge and refuted that charge by demonstrating that the actual pricing behavior of the industry was totally inconsistent with any hypothesis of conspiratorial behavior. By so grossly overstepping the proper bounds of fair comment upon the evidence, the trial court committed serious error. *United States v. Nazzaro*, 472 F. 2d 302, 307 (2nd Cir. 1973); *United States v. DeSisto*, 289 F. 2d 833 (2nd Cir. 1961).

The conduct of the trial judge left the jurors little room to doubt the contempt he felt for defendants' legal position and the negligible weight he attached to critical defense evidence. The trial court did not perform as an impartial arbiter and strayed so far from that role that reversal is required.

APPENDIX A

KEY INDIVIDUALS WHO HAVE DIED

Name	*Date of Death*	*Company Affiliation*	*Alleged Co-Conspirator*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Barber, R. D.	9/19/72	National	Yes	28	10	1
Berrey, Rhodes C.	8/29/73	USG	No	1	3	–
Bobbitt, Dorsy B.	2/18/73	National	No	13	11	–
Brown, John W.	2/06/68	National	Yes	94	192	34
Chandler, R. H.	11/02/72	USG	No	5	6	2
Cheatham, Owen R.	10/24/70	G-P	No	1	–	–
Collins, Henry W.	4/01/71	Celotex	Yes	18	–	2
Desgrey, Chas. W.	11/29/71	USG	No	1	–	–
Dixon, W. M.	11/03/69	USG	No	2	–	–
Donoghue, T. L.	10/04/68	Flintkote	No	5	–	–
Grieve, Ora F.	1969	Bestwall	No	–	–	–
Gustavus, Conson	4/17/69	National	Yes	12	15	2
Haelsig, K. F.	7/30/73	Celotex	No	4	–	–
Hart, Harry	1970	Celotex	No	3	2	–
Hildinger, Wade W.	12/29/63	National	Yes	–	1	–

APPENDIX A (Continued)

KEY INDIVIDUALS WHO HAVE DIED (Continued)

Name	*Date of Death*	*Company Affiliation*	*Alleged Co-Conspirator*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Huber, John F., Jr.	7/07/69	National	No	–	–	–
Koller, Linton J.	11/07/67	National	No	–	1	–
Lizars, R. C.	12/27/69	Bestwall	No	–	–	–
Madsen, John R.	2/15/74	National	No	–	–	–
McDaniel, R. E.	1966	Bestwall	No	–	9	1
Miller, Donald W.	6/20/74	Celotex	Yes	88	102	28
Morse, R. H., Jr.	8/10/73	USG	No	–	–	–
Nabors, Bill Joe	2/12/67	USG	No	17	6	–
Nickerson, O. K.	1967	Bestwall	No	1	–	–
Oldham, G. P.	1968	Barrett	No	14	2	–
Quayle, Melvin	11/74	American	Yes	1	31	8
Ross, Leonard W.	4/19/73	Flintkote	Yes	17	2	–
Sadler, H. Frank	10/31/70	USG	Yes	3	10	–
Spehn, J. J.	8/07/72	USG	No	–	1	–
Spence, W. K.	5/67	Fibreboard	Yes	12	1	–
Smeraski, M. P.	11/22/73	Flintkote	Yes	10	14	–
Storey, O. H., Jr.	9/29/64	Flintkote	Yes	6	8	1
Turner, Mardis B.	1/04/73	National	No	–	–	–
Uhlig, Al		El Paso bank	No	3	24	1
Wescoat, L. S.	3/27/73	USG	No	2	–	–
Williams, Eugene E.	1974	National	Yes	15	13	–
Total 36				376	464	80

APPENDIX B

KEY INDIVIDUALS WHO HAVE RESIGNED OR RETIRED

Name	*Date of Resignation or Retirement*	*Company Affiliation*	*Alleged Co-Conspirator*	*Testified Before*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Armstrong, Ted, Sr.	10/73 ret.	Texas	Yes	grand jury	25	43	5
Baker, M. H.	1/01/65 ret.	National	Yes	–	1	1	–
Baldwin, Jos. L., Jr.	5/14/71 res.	USG	Yes	g.j. & trial	3	5	7
Bear, H. C.	12/27/73 ret.	USG	Yes	g.j. & trial	8	54	10
Biswell, Jas.	7/65 res.	Flintkote	Yes	–	2	4	–
Boggs, C.	pre 1967 res.	Flintkote	Yes	–	–	2	–
Bromley, Betty R.	2/15/68 res.	National	No	grand jury	–	–	–
Buckland, Chas. F.	1/21/66 res.	Celotex	No	–	8	–	–
Burgess, Geo. W.	3/30/73 ret.	Fibreboard	Yes	grand jury	2	–	–
Campbell, Roland R.	4/30/70 res.	National	Yes	grand jury	21	10	5
Carry, Champ	5/14/69 ret.	USG	No	–	2	–	–
Cerruti, Melvin F.	3/31/65 res.	National	Yes	grand jury	–	1	–
Christy, James R.	8/08/72 res.	National	No	–	–	–	–
Craddock, L. E.	6/65 ret.	Flintkote	Yes	–	2	1	–
Crandell, Dean D.	6/30/65 ret.	National	Yes	–	3	–	–
Curry, Gene G.	1973 ret.	Flintkote	Yes	grand jury	8	–	–
Davidson, Wm. T.	3/31/72 ret.	National	No	–	9	–	–
DeVore, Donald C.	8/04/72 res.	National	Yes	–	–	1	–
Dutcher, Francis		J-M	Yes	–	2	–	1
Eshelman, C. W.	9/30/73 ret.	Kaiser	No	–	4	2	–

KEY INDIVIDUALS WHO HAVE RESIGNED OR RETIRED (Continued)

Name	*Date of Resignation or Retirement*	*Company Affiliation*	*Alleged Co-Conspirator*	*Testified Before*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Evans, Geo. R., Jr.	8/15/69 res.	USG	Yes	grand jury	26	14	8
Finck, Elmer E.	4/64 ret.	National	No	–	–	–	–
Fredericks, R. G.	6/67 res.	G-P	Yes	g.j. & trial	35	48	17
Futterer, C. O.	4/30/66 ret.	USG	No	grand jury	4	–	–
Gauger, Henry	3/25/68 res.	Celotex	Yes	grand jury	–	–	–
Gimlin, Robt. C.	1/28/66 res.	USG	Yes	g.j. & trial	34	78	40
Greenwood, Marvin	5/30/69 ret.	Celotex	Yes	grand jury	64	44	9
Hague, Jos. J.		Kaiser	Yes	grand jury	72	36	4
Hamilton, C. H.	3/29/68 res.	USG	Yes	–	3	–	1
Hank, Leonard L.	3/31/69 ret.	National	No	–	–	–	–
Hardin, Martin	1965 ret.	American	Yes	grand jury	12	32	2
Hildebrand, Edw. L.	4/01/74 ret.	Celotex	Yes	grand jury	8	6	4
Hill, Warren E.	6/01/67 res.	Celotex	Yes	g.j. & trial	44	43	1
Hines, Chas. M.	5/08/68 ret.	USG	No	–	–	–	–
Huckleberry, Claude	1/65 res.	Texas	No	g.j. & trial	13	172	83
Hunt, Wm. H.	1/73 ret.	G-P	Yes	–	41	66	33
Korengel, C. A.	6/30/69 ret.	USG	No	–	–	–	–
Kroth, Earl E.	4/15/70 res.	National	Yes	g.j. & trial	20	11	23
Lane, George V.	12/31/73 ret.	USG	Yes	grand jury	16	8	2

APPENDIX B (Continued)

KEY INDIVIDUALS WHO HAVE RESIGNED OR RETIRED (Continued)

Name	*Date of Resignation or Retirement*	*Company Affiliation*	*Alleged Co-Conspirator*	*Testified Before*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Littlewood, D. B.	9/30/67 res.	National	No	grand jury	7	–	–
Manske, Fred A.	4/30/66 ret.	National	Yes	grand jury	16	12	3
McAdow, H. D.	1/01/71 ret.	Flintkote	Yes	grand jury	6	–	–
McCaskill, K. A.	12/73 ret.	G-P	Yes	g.j. & trial	162	70	62
McDermott, Robt. F.		Matl. Serv.	No	grand jury	–	1	–
McLaughlin, V. M.	5/31/69 ret.	USG	No	–	–	–	–
Meyer, A. L. E.	12/31/69 ret.	G-P	Yes	g.j. & trial	143	93	38
Meyer, Malcolm	1963 res.	Bestwall	Yes	g.j. & trial	19	19	5
Mole, Wm. S.	7/70 ret.	G-P	Yes	grand jury	73	11	2
Mongold, E. L.	5/65 res.	Bestwall	Yes	–	4	3	–
Nelson, John T.	10/15/71 res.	Celotex	No	trial	15	9	4
Newman, D.	7/67 res.	Flintkote	Yes	–	14	2	–
Nolte, Harold R.	9/22/67 res.	Flintkote	Yes	grand jury	3	1	–
Norris, R. S.	5/31/69 ret.	USG	No	–	1	–	–
Pendergast, Jas. B.	1967 res.	Allied	No	–	8	1	–
Powers, J. M.	1968 res.	G-P	No	–	20	–	–
Rains, A. W.	2/25/66 ret.	USG	No	–	–	–	–
Rembert, Edward	5/31/69 ret.	USG	No	–	5	1	–
Rhode, Genevieve	7/31/67 res.	Celotex	No	–	2	–	–
Russell, R. D.	8/31/67 res.	USG	Yes	–	1	7	–

APPENDIX B (Continued)

KEY INDIVIDUALS WHO HAVE RESIGNED OR RETIRED (Continued)

Name	*Date of Resignation or Retirement*	*Company Affiliation*	*Alleged Co-Conspirator*	*Testified Before*	*Times Referred to in Govt. Exhibits*	*Times Referred to in Govt. Witness Testimony*	*Times Referred to in Govt. Closing Argument*
Scott, W. B.	7/31/66 ret.	USG	Yes	–	1	1	–
Seitz, Wm. L.	2/01/72 ret.	Flintkote	Yes	grand jury	35	7	2
Shaver, C. H.	5/10/67 ret.	USG	Yes	grand jury	15	7	1
Sikes, Robt.	3/17/67 res.	G-P	Yes	g.j. & trial	207	84	34
Simpson, B. W.	6/30/71 ret.	Kaiser	No	–	5	1	–
Smith, Otley	1965 res.	American	No	grand jury	–	3	–
Stellner, Frank L.	8/31/71 ret.	USG	No	–	8	1	–
Stephan, R. D.	5/31/71 ret.	USG	Yes	grand jury	5	3	–
Underwood, R. E.	2/28/69 ret.	USG	No	–	7	–	–
Wagner, Fred A.	5/31/71 ret.	National	Yes	g.j. & trial	25	7	4
Warren, J. W.	3/69 res.	Flintkote	Yes	–	7	1	–
Webster, Chas. D.	4/15/70 res.	National	Yes	g.j. & trial	38	11	6
Weiser, F. W.	7/31/69 ret.	USG	Yes	grand jury	28	23	7
White, Ogden C.	9/30/69 res.	Fibreboard	Yes	grand jury	29	10	4
Williams, D. E.	12/31/66 res.	Celotex	No	–	4	–	–
Wooley, Harold	10/01/69 res.	Celotex	No	–	4	–	–
Wright, Wm. E., Sr.	4/30/70 ret.	National	Yes	grand jury	2	9	6
Yeager, Lloyd	5/01/66 ret.	Gyp. Assn.	No	–	43	8	–
Total 77					1,450	1,088	433

IV. Grave Prosecutorial Misconduct Deprived Defendants of a Fair Trial.

The prosecution engaged in persistent misconduct to secure a verdict that could not be obtained on the evidence. Although "zeal outran fairness" throughout the trial, the prosecution's misconduct was not merely the product of excessive zeal. The prosecutor used tactics for which he had been previously admonished in *United States v. American Radiator & Standard San. Corp.*, 433 F. 2d 174, 207-10 (3rd Cir. 1970) (Aldisert, J., dissenting). There, the same prosecutor made inflammatory accusations of "strike-breaking" which Judge Aldisert sharply criticized. Here, the prosecutor brazenly employed the same tactic, suggesting again to a Pittsburgh jury that defendants engaged in "strike-breaking" (1694a, Tr. 6201; Tr. 6513-15). Resort to this highly improper tactic in a second trial cannot be laid to simple "zeal" and, when combined with other flagrant and pervasive forms of misconduct, leads inescapably to the conclusion that the prosecution's objective was a conviction by any means.

The prosecution's misconduct fell into three broad categories, each condemned by the Supreme Court: (1) misrepresentation of evidence, even including the fabrication of an exhibit, *see Berger v. United States*, 295 U. S. 78, 85-88 (1935); (2) unfair examination of witnesses, including asking questions assuming alleged "facts" outside the knowledge of the witness solely for the purpose of jury emphasis, *Berger, supra*, 295 U. S. at 84-85; and (3) appeals to jury passion and prejudice, even going so far as to claim that the individual defendants had to fix prices to keep their jobs, *Viereck v. United States*, 318 U. S. 236, 247-48 (1943).

A. The Prosecution Asserted and Insinuated to the Jury Alleged "Facts" Outside the Record and Misstated and Misconstrued Evidence Which Was in the Record.

The rationale for condemning prejudicial assertions "*dehors*" the record and the misstatement of evidence in the record takes on added force when it is a government attorney who engages in such behavior in a criminal case. In the leading case of *Berger v. United States*, *supra*, 295 U. S. at 88, the Supreme Court noted the prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction" and went on to state:

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* at 88.

This Court has held that, "When a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required." *United States v. Newman*, 490 F. 2d 139, 147 (3rd Cir. 1974). *Accord, United States v. Tucker*, 267 F. 2d 212, 213-15 (3rd Cir. 1959); *See also United States v. Small*, 443 F. 2d 497, 500 (3rd Cir. 1971). Such conduct by a prosecutor constitutes nothing less than improper "testimony," *Newman* at 147, which the prosecutor gives to the jury although "he was not under oath and not subject to cross-examination," *Tucker* at 214.

An indefensible instance of this kind of misconduct occurred during the examination of Eugene Burch, a G-P

employee and prosecution witness, when the prosecution resorted to the outright fabrication of an exhibit. During cross-examination of Burch, counsel for G-P offered into evidence a chart comparing actual market prices with published prices in Pittsburgh over a period of time (G-P 100).[120] For *voir dire*, the prosecutor made up an exhibit (GX 5006) by stapling together two unrelated documents so that they appeared to be but two parts of a single whole. Aided by this "document" of his own manufacture the prosecutor induced the witness to testify that the G-P chart contained an inaccuracy. The rewards of this fabrication were swift and devastating to defendants. The trial judge preemptorily ordered that the G-P chart be stricken and instructed the jury to "[t]otally ignore the exhibit. It is based on incorrect information." (1431a-1433a, Tr. 5364-65).[121]

After the prosecutor's slight-of-hand was subsequently discovered, it was established that the two pages of the prosecution's *voir dire* exhibit (GX 5006) in fact were separate and unrelated documents which should not have been attached to each other, and that the stricken G-P chart was actually accurate (1484a-1488a, Tr. 5581-87).[122]

120. G-P 100 was one of an important series of "pink sheet" charts which proved that actual market prices were unrelated to and lower than published prices, and that market prices were declining over time (see *supra* at 73).

121. The trial court's precipitous action in striking the G-P chart for an alleged error which, even if real, would have been insubstantial, contrasts sharply with his subsequent treatment of errors in prosecution exhibits. When actual errors were discovered in prosecution exhibits, the trial court, outside the presence of the jury, ruled that the errors could be corrected during witness examination and the exhibits admitted (Tr. 7237-38).

122. The trial court's action in striking the first pink sheet chart G-P introduced at trial severely prejudiced defendants, since it not only cast doubt on the validity and significance of that chart, but that same doubt may have been carried over, in the jury's mind, to other defense exhibits subsequently admitted in evidence.

The prosecutor's use of this fabricated exhibit deprived G-P's counsel of valuable evidence during an important cross-examination, misled and confused both the witness and the trial judge, and discredited defendants, their counsel and their evidence before the jury.[123]

Another serious incident of misconduct occurred during final argument when the prosecutor falsely accused defense counsel of suborning perjury. Defendant Andrew Watt testified about a late 1965 meeting with Jim Walter of Celotex, during which they discussed Celotex' threatened cancellation of a contract involving mineral wool insulation products purchased from USG (3253a-3255a, Tr. 12,721-24; 3366a-3368a, Tr. 12,972-74). Watt's testimony concerning the purpose of this meeting was substantiated by a wealth of contemporaneous documentation,[124] and stood undisputed at the close of evidence. However, the prosecutor was desperate to link this meeting with a November 17, 1965 price increase announcement and a subsequent credit terms announcement, and to discredit Watt and Watt's counsel before the jury. The prosecutor therefore charged that counsel for Watt "set up that story" about the mineral wool contract knowing it was false. He based this scurrilous charge on the assertion that Watt's counsel "had a contemporaneous document prior to the time of the November 17 announcement in

123. The prosecutor's misrepresentation of documentary evidence was not isolated. *See* 1292a-1294a, Tr. 4403-06; 1235a-1236a, Tr. 3854-55; 1553a, Tr. 5737; 2790a-2800a, Tr. 10,971-84. For example, another instance occurred when the prosecutor sought to convey that defendants had edited Gypsum Association minutes to delete supposedly "incriminating" evidence. The witness was examined at length, about why "not one word" about a "credit committee" appeared in the minutes (415a-418a, Tr. 906-10). In fact, the minutes actually referred to that matter (427a-429a, Tr. 948-49).

124. *See* USG 772; USG 779; USG 793; CEL 43; CEL 44; CEL 45; CEL 46; CEL 47; CEL 48; CEL 49; CEL 1108; CEL 1109; CEL 1110.

Watt's own handwriting that he talked to . . . Walter of Celotex . . . with respect to his assignment on the [Gypsum Association] Special Task Force, and one of those assignments was credit." (3780a, Tr. 13,917). In fact, there is no such document and the prosecutor's charge was a total fabrication.

In short, the prosecutor falsely represented to the jury the date and contents of a non-existent document to support a reprehensible argument that Watt and his counsel "covered-up" incriminating evidence of a conspiratorial meeting with perjured testimony.[125] Similar remarks by a prosecutor concerning the propriety of defense counsel's conduct were specifically noted as grounds for reversal in *Berger, supra*, 295 U. S. at 88, and in *Wagner v. United States*, 263 F. 2d 877, 883, 884 (5th Cir. 1959).

Compounding his other misconduct in closing argument,[126] the prosecutor "testified" to his and the federal

125. The prosecutor repeatedly made derogatory comments and accusations concerning defense counsel during final argument. For example, he accused all defense counsel of withholding relevant evidence from defendants' economic expert witness (Tr. 13,944), and then compounded the situation by asserting to the jury, without record support, what such alleged evidence would have shown (Tr. 14,772-74). See also, 3780a-3781a, Tr. 13,957-58; Tr. 14,698; 3845a-3846a, Tr. 14,758. These comments during final argument were merely the culmination of a series of improper remarks concerning defense counsel uttered by the prosecution throughout the trial. See 314a-315a, Tr. 491-95; Tr. 2929; Tr. 3294; Tr. 3520; Tr. 3606-07, and Tr. 3610-12; Tr. 4833; Tr. 6741; Tr. 7541; Tr. 8954.

126. Also during final argument, the prosecutor improperly accused defendants of violating the Robinson-Patman Act by lowering their prices—an offense not charged in the Indictment. Fellinger of G-P testified that he "tried to make it a habit . . . of beating" his competitors in selling products to customers (2907a, Tr. 11,288) and, therefore, "cut prices on every day on every product" (2911a, Tr. 11,295). Unable to refute this evidence of price competition, the prosecutor instead argued to the jury: "Now if you believe Mr. Fellinger, if you believe that, then he is violating the Robinson-Patman Act. That is discrimination. Where is his good faith?" (3774a,

government's belief in the guilt of defendants and told the jury that the consequences of an acquittal would be to encourage future unlawful conduct at the expense of consumers. The prosecutor opened to the jury with the claim that "corporations aren't prosecuted willy-nilly" (288a, Tr. 209-10),[127] and closed with an assertion that the claimed criminal acts would continue unless guilty verdicts were returned:

> "I want to leave you with this thought: The total sales by the Defendants and co-conspirators during this conspiratorial period was 4.8 billion dollars. Now, think about that when you are deliberating. *Are you going to send the Watts and the Nicelys and the Browns back with a clean bill, to continue this?* 4.8 billion dollars? A 13-year period. . . . Consider what they have done and *what they can continue to do.*" (3782a, Tr. 13,996, emphasis added).

The prosecutor may not insinuate to the jury that he personally or the "government" believes that a defendant is guilty. Such a suggestion improperly invites the jury to rely on the personal knowledge or sincerity of the prosecutor rather than upon the evidence in the case. *United States v. Schartner*, 426 F. 2d 470, 478 (3rd Cir. 1970).

126. (Cont'd.)
Tr. 13,871). Charging defendants with a Robinson-Patman Act violation was doubly prejudicial because it suggested erroneously that defendants' extensive price-cutting constituted another antitrust violation and that defendants' Robinson-Patman compliance efforts were a "sham". Misstatements of the law during final argument are grounds for reversal, *United States v. Bohle*, 445 F. 2d 54, 69-71 (7th Cir. 1971), as are claims of other alleged unlawful conduct not charged in the indictment. *Wagner v. United States, supra*, 263 F. 2d at 883.

127. Defense objections to this remark were denied in the presence of the jury, thus enlarging its prejudicial impact.

Reversal is required when a prosecutor communicates his personal belief in guilt by suggesting that the government would not have indicted a defendant unless he were guilty, *Minker v. United States*, 85 F. 2d 425, 426-27 (3rd Cir. 1936), or by stating that "we try to prosecute only the guilty," *Hall v. United States*, 419 F. 2d 582, 587 (5th Cir. 1969). Likewise, convictions cannot stand after a prosecutor communicates his personal belief in guilt by predicting that the accused will continue his criminal acts in the future unless the jury returns a guilty verdict. *United States v. Williams*, 523 F. 2d 1203 (5th Cir. 1975); *United States v. Sprengel*, 103 F. 2d 876, 884 (3rd Cir. 1939).

The prosecution's misrepresentations of the evidence, assaults on the integrity of defense counsel, and expressions of personal belief as to guilt deprived defendants of a fair trial.[128]

B. The Prosecution Engaged in Improper and Unfair Examinations of Witnesses.

The prosecutor in this case used every trick in the book in his examination of witnesses. Misstatements of prior testimony, barbed quips and asides, and expressions

128. Yet another example of misconduct in the prosecutor's closing argument occurred when he commented on the failure of defense counsel to call as witnesses certain persons who had been subpoenaed by and who were equally accessible to the prosecution (Tr. 14,793-94). This can be reversible error *unless* the trial judge "promptly [instructs] the jury to disregard the prosecutor's remarks." *See Pennewell v. United States*, 353 F. 2d 870, 870-71 (D. C. Cir. 1965). But when defense counsel objected to the prosecutor's improper comments, the trial judge not only overruled the objection, but also admonished defense counsel before the jury: "May I point out that objections do not serve the purpose of rebuttal. That is not the proper purpose, and I don't appreciate it occurring." (Tr. 14,794). This abrupt reaction by the judge was inexcusable since the trial court had earlier rebuffed defendants' efforts to forestall such an improper argument by the prosecutor (Tr. 13,744-45; DJX 100-103) and, thereafter, refused to give a corrective charge (Def. G-P Supp. Req. B-E).

of disbelief and disparagement were rife. Such unfair conduct during witness examination was expressly condemned in *Berger, supra*, 295 U. S. at 84-85.[129] With many witnesses, the prosecution was simply overbearing. Intimidating and threatening examinations, such as the one during which the prosecutor demanded of a witness whether a certain defense exhibit had been "created or concocted—or what have you—by reference to . . . monthly reports" written "By Mr.—what the hell was his name?", (2091a, Tr. 8436-37), necessitated repeated objections by defense counsel (See e.g., 1151a-1152a, Tr. 3413-14; 1203a-1204a, Tr. 3666-68; Tr. 3772-73; 1229a-1230a, Tr. 3798; Tr. 788-89; 415a, Tr. 906).[130]

When such tactics failed to elicit the testimony which the prosecutor desired, the prosecutor freely and openly communicated to the jury his personal disbelief in the testimony. Unhappy about an answer given by one witness, the prosecutor exclaimed "Oh, come on. . . ." (Tr. 3645).[131] Many times, the prosecutor communicated to the jury his disbelief in a witness' testimony by the phrasing of his questions, such as when he asked one witness, "Continuing with your Robinson-Patman Act compliance,

129. Like the Supreme Court in *Berger*, this Court has also reversed a conviction due to the prejudicial impact of an improper and unfair examination of a witness. *United States v. Gullo*, 502 F. 2d 759 (3rd Cir. 1974). *Accord, United States v. Graham*, 325 F. 2d 922, 926-28 (6th Cir. 1963); *Dugan Drug Stores, Inc. v. United States*, 326 F. 2d 835, 837 (5th Cir. 1964).

130. These overbearing examinations usually occurred when the prosecutor misstated the witness' prior testimony and then sought to examine upon that basis, or otherwise attempted to put words in the mouths of witnesses. See, e.g., 1251a-1252a, Tr. 3929; 365a-366a, Tr. 795-97; Tr. 4242-43; 1288a-1289a, Tr. 4378-79; Tr. 4542-43; Tr. 5294-95.

131. For other examples, see 391a, Tr. 874; Tr. 3772-73; 2092a-2093a, Tr. 8452-53; Tr. 8494-98; Tr. 8965; Tr. 785; Tr. 1761; Tr. 3775; Tr. 5477; Tr. 7457-58.

Mr. Gimlin, if you were so all-fired hot to comply with the Robinson-Patman Act—" (1203a, Tr. 3667).[132]

In addition to such disparaging comments, the prosecutor also attempted to discredit witnesses by pursuing improper and prejudicial lines of inquiry.[133] For example, defendant Wat testified that he wrote a memorandum in February, 1 69 informing various officials of USG to stop verifying on all products but explained that the document had no practical application to gypsum products on which verification had ceased several months earlier (3306a-3307a, Tr. 12,870-72). The prosecutor attempted to discredit this testimony by asking Watt whether he was aware that his memorandum had been produced to the government by counsel for USG in compliance with a grand jury subpoena "that called for just documents relating to gypsum products" (3308a-3309a, Tr. 12,874). But in fact, the prosecutor well knew that the Watt memorandum had not been returned pursuant to the grand jury subpoena, but rather had been produced when the prosecution had specifically requested it (3308a-3309a, Tr. 12,874-75). In addition to creating an utterly false

132. The prosecutor also made sweeping comments designed to completely discredit a witness before the jury. For example, when he wanted to communicate to the jury his belief that one former employee of G-P had engaged in conspiratorial communications with employees of National, the prosecutor brazenly announced to the jury, "This witness knows everything that National Gypsum was doing" (1316a-1317a, Tr. 4578-79). For other examples, see Tr. 4564-65; Tr. 5319-20; Tr. 7441; Tr. 8304-05.

133. Another method used by the prosecution to discredit witnesses was "fake impeachment": after eliciting testimony from a witness, the prosecutor would dramatically read allegedly impeaching prior testimony which in reality was entirely consistent with the witness' testimony on the stand. See, e.g., 3301a-3303a, Tr. 12,864-66; Tr. 4209-10; Tr. 5521-24; Tr. 7390. On one occasion the prosecutor attempted to impeach a witness by communicating to the jury the grand jury testimony of someone else (1241a-1242a, Tr. 3881-83).

impression, it was clearly improper to ask Watt, an individual defendant, about corporate counsel's conduct during grand jury proceedings and to suggest erroneously thereby that the defendant's testimony had been contradicted by counsel for USG.[134]

A more subtle examination technique, often employed by the prosecution, was to phrase questions to assume prejudicial facts not in evidence, and not even within the knowledge of the witness, solely for purposes of jury emphasis. This questioning technique has specifically been held to require reversal. *Berger v. United States, supra,* 295 U. S. at 84; *United States v. Nettl,* 121 F. 2d 927 (3rd Cir. 1941); *United States v. Perlstein,* 120 F. 2d 276, 283-84 (3rd Cir. 1941).

On one occasion, the prosecutor asked McCaskill, formerly of G-P, at least five times in quick succession whether McCaskill knew that William Hunt, President of G-P, had meetings or telephone conversations with Graham Morgan, President of USG, concerning the May 1, 1969 price increase. Each time the question assumed that such contacts did take place and each time McCaskill denied any knowledge of any such contacts (Tr. 4474-81).[135] The prosecutor obviously did not care about the answer he got; the sole purpose of the repetition was to implant the idea of alleged conspiratorial contacts in the jurors' minds.

As this Court observed in *United States v. Nettl, supra,* 121 F. 2d at 930, a prosecutor's persistence in repetitive

134. For other examples, see Tr. 942-43 and 2081a, Tr. 8304-05.

135. No evidence of improper Hunt-Morgan conversations was introduced at trial. The trial judge overruled defense counsel's objection to these repetitive questions which assumed prejudicial facts not in evidence (1299a, Tr. 4477). It is therefore particularly significant to note that this Court reversed in *United States v. Perlstein, supra,* 120 F. 2d 276, even though the trial judge in that case sustained defense counsel's objections to each one of a series of repetitive prejudicial questions. *Id.* at 283-84, n. 3.

questioning which continuously assumes the same alleged "facts" not in evidence has a "prejudicial character [which] scarcely requires elaboration" because the purpose of such questions is "to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based." Such prejudice becomes acute over a long trial. In a short trial, a prosecutor's insinuation of alleged "facts" not in evidence might be excused since the jury would more likely retain a clear recollection of the actual evidence. *See United States v. Hudson*, 432 F. 2d 413 (9th Cir. 1970). But one cannot assume that, after the lengthy trial in this case, the jury was able to separate facts actually testified to by witnesses from assumed "facts" repeatedly urged in the prosecutor's questions.[136]

The prosecutor's use of questions which assumed facts not in evidence was far more prejudicial in this case than in *Berger*, *Nettl*, or *Perlstein*, because here such questions were usually asked of witnesses who could not possibly have known the answers. The prosecutor persistently questioned witnesses about the conduct—and even the

136. An additional danger arises when a prosecutor incorporates into such questions details and specifics which subtly induce the jury to believe that he *must* be referring to actual events in his questions. *See United States v. Nettl*, *supra*, 121 F. 2d at 930. The prosecutor here effectively utilized this technique. See, e.g., 1133a-1134a, Tr. 3368; 1261a-1263a, Tr. 4050-52; 1263a, Tr. 4055. Also, as this Court observed in *Nettl*, such questions are of "the form which lends itself most readily to *voice inflection*." *Id.* at 930, emphasis supplied. The prosecutor took advantage of this fact as well. For example, at one point the trial judge even felt impelled to state to the jury: "Ladies and Gentlemen, Mr. Fricano has a way of asking those questions as if it were a fact. . . . I would prefer him to ask the question whether there was a price increase, *but he has his ingrained habits*." (1296a, Tr. 4445-46, emphasis supplied). See also 1616a, Tr. 5888; Tr. 6655.

state of mind—of other persons.[137] The witnesses therefore could not deny the truth of the prejudicial "facts" assumed in the questions, thus creating an unwarranted aura of correctness.

In the final analysis, the prosecution utilized virtually every improper examination technique condemned by the authorities. The prosecutor's overbearing manner, misstatement of the witnesses' prior testimony, expression of personal disbelief in the testimony, disparagement, quips, and assumption of facts not in evidence, all were calculated to, and did, deprive defendants of a fair trial.

C. The Prosecutor Attempted to Secure a Verdict by Blatant Appeals to Jury Passion and Prejudice.

In *Viereck v. United States*, *supra*, 318 U. S. 236, the Supreme Court sharply criticized a prosecutor who indulged in a jury appeal "wholly irrelevant to any facts or issue in the case, the purpose and effect of which could only have been to arouse passion and prejudice." *Id.* at 247-48. This Court has similarly held that a prosecutor's irrelevant remarks calculated to prejudice a criminal defendant in the eyes of the jury is reversible error. *United States v. Georga*, 210 F. 2d 45, 46-47 (3rd Cir. 1954). *Accord*, *United States v. Fullmer*, 457 F. 2d 447, 449 (7th Cir. 1972); *United States v. Hayward*, 420 F. 2d 142, 146 (D. C. Cir. 1969).

137. For example, McCaskill was asked whether Snell, counsel to the Gypsum Association, was concerned about the Materials Handling Committee because it "was involved in anti-competitive practices and agreements." (1323a, Tr. 4618). On another occasion, the prosecutor asked Pappert of USG if he knew whether defendant Watt discussed the elimination of pallets at a Gypsum Association meeting in April, 1971 even though the record established that Pappert was not in attendance at the meeting and no evidence was ever offered to support the allegation implicit in the question (1868a-1869a, Tr. 6925 and Tr. 6942). For further examples, see 423a-424a, Tr. 930-32; Tr. 4194-95; Tr. 6561; Tr. 12,767.

The prosecutor here seized every opportunity to make irrelevant remarks calculated to prejudice defendants before the jury. For example, the prosecutor resorted to unfair characterizations of defendant corporations by referring to them as "these big companies with their fat profits" (Tr. 223), whose executives, including the individual defendants, attended trade association meetings at "plush resorts" (Tr. 218; 329a, Tr. 549; Tr. 648-49; Tr. 13,834).[138] The prosecutor suggested to the jury that employees of defendants were "buddies" (1129a-1130a, Tr. 3357), and repeatedly referred to all defendants as belonging to a "tight little club" (Tr. 229; Tr. 238; see also Tr. 215; Tr. 224; 3770a-3771a, Tr. 13,835). He further suggested to the jury that as members of this alleged "club," defendants engaged in "strike-breaking" (1694a, Tr. 6201 and Tr. 6513-15).[139] These characterizations of defendants

138. See also Tr. 536; Tr. 642-43; 1107a, Tr. 3311-12; 1838a, Tr. 6847. The prejudicial impact of the prosecutor's remarks concerning defendants' alleged "affluence" was undoubtedly accentuated by the trial judge's final charge to the jury which contained needless, callous, and unsupported assumptions about defendant Colon Brown's "chauffeur" and defendant Jay Nicely's "gardener" (3904a, Tr. 14,887).

139. The prosecutor's totally irrelevant remark concerning "strike-breaking" was calculated to prejudice defendants before a jury sitting in a strong labor community. When this same prosecutor made similar irrelevant references to alleged strike-breaking in *United States v. American Radiator & Stand. San. Corp.*, 433 F. 2d 174 (3rd Cir. 1970), Judge Aldisert voted to reverse a conviction, 433 F. 2d at 207-10, even though, unlike this case, the evidence of defendants' guilt was "compelling" and included "'eyewitness' testimony" of price-fixing agreements. 433 F. 2d at 182. There was no such "eyewitness testimony" in this case, nor does it appear that the jury found the evidence "compelling". It is therefore particularly important to emphasize Judge Aldisert's warning that irrelevant references to strike-breaking have "an explosive capacity for inflaming a Pittsburgh, Pennsylvania jury." 433 F. 2d at 208. On another occasion, the prosecutor sought to elicit irrelevant testimony that defendants supposedly had put a customer out of business even after the trial judge had ruled the subject inadmissible during an offer of proof (Tr. 7057-60, 7093).

and their actions are grounds for reversal because they are "especially likely to stick in the minds of the jury and influence its deliberations." *Hall v. United States*, 419 F. 2d 582, 587 (5th Cir. 1969).[140]

The prosecutor also repeatedly attempted to elicit prejudicial testimony. During his examination of one prosecution witness, the prosecutor asked a question which suggested that defendants were guilty of a Robinson-Patman Act violation. The trial judge sustained defense counsel's objection and observed that "[w]e are not trying a Robinson-Patman case." At this, the prosecutor sarcastically retorted, "I didn't think we were, either," and proceeded to ask the witness the same question once again (1438a-1439a, Tr. 5416-17). Heedless of the court's warning, the prosecutor attempted again to elicit testimony from another witness concerning an alleged Robinson-Patman Act violation (Tr. 7092-93) in direct contravention

140. The prosecutor repeatedly incorporated such unfair characterizations into his examination of witnesses. For example, he referred not to the editing of draft minutes of Gypsum Association meetings but to the "laundering or the cleaning up of these minutes" (508a, Tr. 1285), a characterization which the trial judge reinforced by improperly adopting it himself (1322a-1323a, Tr. 4607-08). Falsely implying that the defendant corporations were guilty of deceit or dishonesty by billing customers at full list prices and then subsequently giving a discount with a rebate check or credit memo, the prosecutor characterized the invoice price as "phony" and "Fictitious. Unreal. False" (721a, Tr. 2019; 1204a-1205a, Tr. 3670-71; 1290a, Tr. 4381), and then demanded of a witness, "Where is the good faith in all that, Mr. Gimlin?" (1204a, Tr. 3670) or, "So why go through the charade?" (Tr. 5940). Indeed, during the cross-examination of defendant Watt, the prosecutor suggested the wholly irrelevant fact that this billing procedure was allegedly designed to deceive customers and thereby cause some customers to pay more than others (Tr. 12,907-09). For further examples of the prosecution's unfair and prejudicial characterizations, see 622a-624a, Tr. 1873-76; 1130a, Tr. 3358; 3261a-3262a, Tr. 12,755-56; Tr. 12,760-61; 3278a-3280a, Tr. 12,833-34.

of the trial court's prior ruling (Tr. 7050-53 and Tr. 7060).[141]

The significance of this particular type of misconduct was enhanced by the recurrent theme in the prosecutor's final argument that the jury might infer that defendants conspired to fix prices because it would have been perfectly "in-character" and "natural" for them to do so. The prosecutor incredibly suggested that defendant Colon Brown of National Gypsum and the chief executive officer of USG *must* have conspired because "[t]hese men had too much standing on the line not to nail everything down; their jobs, their reputations, the profits of their companies" (Tr. 13,918-19), and similarly implied that defendant Andrew Watt would have lost his job at USG had he not conspired (3779a, Tr. 13,912). The prosecutor argued that it was just "good common sense" and "couldn't possibly be otherwise" that when businessmen meet to negotiate buy-sell contracts, they go further and also discuss general market prices (Tr. 13,811). This theme was reiterated when, on two occasions, the prosecutor read to the jury the time-worn quote from Adam Smith that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices" (See Tr. 13,798). These reprehensible assertions that the jury should believe defendants guilty of price-fixing simply because they are businessmen are indistinguishable from the argument that a politician necessarily takes bribes simply because he is a politician—an argument which necessitated reversal in *Dunn v. United States*, 307 F. 2d 883, 885-86 (5th Cir. 1962).

141. During the examination of defendant Watt, the prosecutor pursued a line of inquiry which could only have been relevant to a charge of monopolization and not to the offense charged (3263a-3264a, Tr. 12,763-64):

D. Defendants' Convictions Must Be Reversed Because the Severity and Frequency of the Prosecution's Misconduct Poisoned the Trial.

The more than one hundred specific examples of serious prosecutorial misconduct cited in this brief are by no means an exhaustive listing,[142] but should nevertheless suffice to demonstrate that defendants were subjected, day by day, week by week, to an onslaught of prejudicial behavior which necessitated nine motions for mistrial.[143] The infrequent occasions on which the trial judge sustained defense objections or, less often, gave cautionary instructions, accomplished little in deterring further misconduct.[144] The

142. Many additional examples of prosecutorial misconduct were fully briefed in "Defendants' Memorandum in Support of the Joint Motion for Mistrial for Prosecutorial Misconduct," filed with the trial court, or were described on the record to support defendants' nine motions for mistrial on this ground. (See *infra* at n. 143, and those examples of prosecutorial misconduct discussed in appellant Andrew Watt's Supplemental Brief).

143. See Tr. 1253-58; Tr. 1823-31; 697a-700a, Tr. 1988-92; 699a-700a, Tr. 1992-96; 766a-768a, Tr. 2089-91; Tr. 3451-55; Tr. 3716-20 and Tr. 3823-24; Tr. 3882-89; Tr. 4112-13; 1382a-1384a, Tr. 4994-5031; Tr. 5048 and Tr. 5052-59; Tr. 6513-15; Tr. 6942-43; Tr. 14,815-16; Tr. 15,033-54, and Tr. 15,076-77.

144. The trial court was unsuccessful in preventing even immediate disobedience of its rulings. As just one example, the prosecution witness H. C. Bear *twice* testified that 84ex-95ex, GX 22, a USG document entitled "Legal Aspects of Selling," was a memo designed to guide that corporation's field salesmen and was not a written policy directed at merchandising personnel (such as himself) (560a-563a, Tr. 1539-42; Tr. 1633-37). Despite this testimony, the prosecutor later persisted in exploring with Gimlin, Bear's successor (Tr. 1415), his "compliance" with this alleged "printed policy" of United States Gypsum even though Gimlin, not a salesman but a mechandising department official, had never seen the document before (1081a-1083a, Tr. 3223-24). Though the court instructed the prosecutor to end such interrogation (1199a-1203a, Tr. 3658-63), just a few minutes later the prosecutor returned to it and again totally mischaracterized GX 22 as a company policy: "Yet even with respect to those products, you violated the company policy as depicted in GX No. 22?" (1205a-1207a, Tr. 3672-73). Similarly, see Tr. 2896-97, and *compare* with prior order: Tr. 2696; 1418a-1419a,

authorities recognize that cautionary instructions are of very questionable value, *Krulewitch v. United States*, 336 U. S. 440, 453 (1949) (Jackson, J., concurring), and where, as in this case, prosecutorial misconduct is highly prejudicial or is repeated despite actions taken by the trial judge, the only remedy is reversal of convictions obtained in a trial so thoroughly poisoned. *Berger v. United States, supra*, 295 U. S. at 85. *United States v. Newman, supra*, 490 F. 2d at 146-47. As this Court noted in *United States v. Georga, supra*, 210 F. 2d at 47, where a conviction was reversed despite an immediate and strong cautionary instruction, there are certain types of prosecutorial misconduct which "are not the kind that jurors could 'put out of their minds' simply by being told to do so." This same thought was also expressed in *Dunn v. United States, supra*, 307 F. 2d at 886:

> "It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"

The Supreme Court's conclusion in *Berger* applies here: "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." 295 U. S. at 85.

Even more significant here, the trial judge took no action at all to "cure" the prejudice caused by most of the prosecution's misconduct. At different times during the trial, the judge benignly excused repeated overreaching

144. (Cont'd.)
Tr. 5287-88, and *compare* with prior order: Tr. 5240-41; 1677a-1678a, Tr. 6137-38, and *compare* with prior order: Tr. 6051.

merely because the prosecutor "has his ingrained habits" (1296a, Tr. 4445-46), is a "temperamental and irrepressible" person who had "a desire to inject a little lightness in the proceeding" (Tr. 3452-53), and even because the prosecutor "is an emotional person" due to his "Mediterranean" background (Tr. 8494-98).[145] When, as a last resort, defense counsel themselves attempted to "cure" some of the prosecutor's misconduct by pointing out to the jury during final argument some specific distortions of the evidence, the prosecutor capitalized in rebuttal on the trial judge's prior failure to control his misconduct. Thus, the prosecutor improperly argued that the jury "cannot believe" that he had done anything unfair at any time during the trial, because otherwise the trial judge would have declared a mistrial (3842a-3843a, Tr. 14,693-94).[146]

Furthermore, when the prosecutor committed some of the most prejudicial excesses of the entire trial by clear misstatements of the record evidence and improper arguments while closing to the jury,[147] the trial judge exhibited outright hostility when defense counsel exercised their

145. Before the jury, the prosecutor himself attributed his own "theatrics" to "indignation pure and simple" (371a, Tr. 848). On other occasions, the prosecutor exclaimed to the court, "[T]hat was rhetoric, but I do get a little inflamed inside when I start thinking of what has been going on in this courtroom for the past three months" (Tr. 8085) and, similarly, "[I]f I am emotional—If I am emotional and if I am shaking, it is because of what has been happening in this courtroom for the past two weeks . . ." (Tr. 9500). But whatever the motivation, the fact remains that the prosecutor repeatedly behaved like a man possessed (see, e.g., Tr. 9531), a condition for which the trial judge at one point prescribed "tranquilizers" (Tr. 9499).

146. Such an argument, which invokes a trial judge's ruling that the prosecution's case is properly submitted to the jury and which thereby tends to identify the trial judge with the prosecution, is itself reversible error. *See United States v. Gambert*, 410 F. 2d 383 (4th Cir. 1969).

147. See *supra* at 147-49, 158.

right to object.[148] Later, when defense counsel moved for a mistrial on the basis of the prosecutor's numerous misstatements of the record, the trial judge denied the motion even before giving defense counsel an opportunity to inform him of the distortions upon which the motion was based (Tr. 14,815).

The tactics of the prosecutor in this case are at least as objectionable as those condemned by the Supreme Court in *Berger v. United States*, 295 U. S. 78 (1935). The prejudicial effect of these tactics cannot be explained or excused by inexperience, excessive zeal or the normal slips that occur in a hotly contested trial. Instead, the record points to an experienced prosecutor bent upon achieving convictions at any cost without proper regard for the constitutional obligation of fairness resting on the government in litigation against its citizens. This climate was aggravated by the trial judge's inability and frequent refusal either to control these practices or forcefully correct the resulting prejudice when it occurred. Indeed, as the Supreme Court ruled in *Berger*, it cannot be assumed that prosecutorial misconduct caused no prejudice, particularly where, as here, the misconduct was repetitive and had a "probable cumulative effect upon the jury." 295 U. S. at 89.[149] As the court observed in *United States v. Ott*, 489 F. 2d 872 (7th Cir. 1973):

> "To make it plain that the language of *Berger* conveys a message which must be heeded, not just admired, reversal is sometimes required." *Id.* at 874.

Reversal is required in this case.

148. For example, before the jury the trial judge at one point labeled defense objections to the prosecutor's exceeding the record evidence as "pure harassment" (Tr. 14,751-52).

149. In *United States v. Arendale*, 444 F. 2d 1260 (5th Cir. 1971), the court reversed a conviction for prosecutorial misconduct where the jury acted very much like the jury did in this case. *Id.* at 1268-69.

V. The Trial Court's Coercion of the Deadlocked, Ill and Exhausted Jury Requires Reversal of the Verdicts.

The absence of substantial evidence proving the conspiracy charged produced a jury deadlock despite erroneous instructions and other prejudicial errors committed by the trial judge, and the grave misconduct of the prosecution. That deadlock was broken only by the trial judge's insistence that the distraught, ill and exhausted jurors reach a verdict "one way or the other" (4068a-4069a, R. Tr. 7). The jurors themselves made clear that the resulting verdicts were not based on "any document, any remembrance of testimony" (4066a-4067a, R. Tr. 4), but rather on "compassion for . . . fellow jurors" (4061a, Docket Entry 322, #24). As a result, the jury foreman confessed to the court that "even if they [the jury] would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no . . ." (4066a-4067a, R. Tr. 4). Consequently, the verdicts in this case were obtained in violation of defendants' Fifth and Sixth Amendment rights to a jury's fair and impartial consideration of the evidence relevant to the charges against them.

A. The Trial Court Erred by Refusing to Declare a Mistrial When the Ill and Exhausted Jurors Were Unable to Reach a Verdict.

Under the Fifth and Sixth Amendment guarantees of the right to trial by an impartial jury, ". . . the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Jenkins v. United States*, 380 U. S. 445, 446 (1965). As stated by Judge Maris sitting by designation in *United States ex rel. Leguillou v. Davis*, 115 F. Supp. 392, 401 (D. V. I. 1953), *rev'd on other grounds*, 212 F. 2d 681 (3rd

Cir. 1954): "Today no element of coercion may be permitted to play any part in the verdict of a jury."

It is axiomatic that a trial judge may not directly coerce a jury by insisting that it must reach a verdict. *Jenkins v. United States, supra,* 380 U. S. at 446. Such pressure by the trial judge raises issues which ". . . can . . . be viewed as turning on Sixth Amendment values." *Virgin Islands v. Gereau,* 523 F. 2d 140, 151 (3rd Cir. 1975). Likewise, a trial judge may not indirectly coerce a verdict by requiring a deadlocked jury to continue deliberating when it is apparent that the jurors suffer from illness. *United States v. Grosso,* 358 F. 2d 154, 159-60 (3rd Cir. 1966), *rev'd on other grounds,* 390 U. S. 62 (1968); from "sheer physical and mental exhaustion," *United States ex rel. Leguillou v. Davis, supra,* 115 F. Supp. at 401; or from confusion and overwork, *Commonwealth v. Clark,* 404 Pa. 143 (1961).

Each of these prohibited circumstances—judicial insistence upon a verdict, excessive deliberations, illness, and exhaustion—infected the jury deliberations in this case. Moreover, these circumstances occurred in the presence of the "crucial factor" in determining whether a mistrial should have been declared: the jury's own statement that it was hopelessly deadlocked. *United States v. See* 505 F. 2d 845, 851 (9th Cir. 1974), *cert. denied,* 420 U. S. 992 (1975); *see United States v. Lansdown,* 460 F. 2d 164, 169-70 (4th Cir. 1972).

On July 11, 1975, the fourth day of the jury's sequestered deliberations, the trial judge informed defense counsel that the long hours of deliberation were adversely affecting the jury. Defense counsel were told that "some of the jurors aren't feeling well" and "[s]ome are tired" (4000a, Tr. 15,128). At least one juror was "actually ill," another was suffering from chills, and a doctor was providing jurors with medication (4001a-4003a, Tr. 15,130; Tr. 15,131-32). The court recognized that the deliberations were undoubtedly "a considerable strain" on a jury which included several elderly people (4003a-4004a, Tr. 15,133).

The jury foreman was summoned and reported to the court, in the presence of counsel, that some jurors were "tired out," "two or three [were] crying," and the jury was concerned about being "away from home for a long time" (4004a-4005a, Tr. 15,134). He added that one of the jurors ". . . realizes what a responsibility it is and she cannot find a way to find the answer" (4004a-4005a, Tr. 15,134), and that "on the other side you will get some of the men who are losing money by this and they want to get the decision, but whether it can be reached or not with the women in that condition is hard to say" (4005a-4006a, Tr. 15,135). As a result of this report, the trial judge agreed to the jury's request that deliberations terminate each day at 6:30 p.m. instead of 10:00 p.m. (4008a-4010a, Tr. 15,139-40).

On the following day, Saturday, July 12, 1975, at 2:45 p.m. the jury transmitted to the trial judge several requests for additional instructions. In open court, the trial judge testily responded to one of these requests by admonishing: "Now I don't know why you don't understand that. I have told you that at the beginning of the case. I told you that at the end of the case and I am telling you that now" (4011a, Tr. 15,142). Then, without prior notice to or consultation with counsel, the trial judge seized this opportunity to give for a second time a "dynamite" instruction directing the jurors to continue to "deliberate with a view toward reaching an agreement" (4013a-4014a, Tr. 15,145-46).[150]

150. *See United States v. Fioravanti,* 412 F. 2d 407 (3rd Cir. 1969), *cert. denied sub nom. Panaccione v. United States,* 396 U. S. 837 (1969), where this Court cautioned on the use of such charges. The trial judge first gave such a *"Fioravanti"* type instruction, also without prior notice to counsel, at the conclusion of his final charge to the jury, on July 8, 1975 (3949a-3950a, Tr. 14,949).

In the late afternoon on Sunday, July 13, 1975, the sixth day of sequestered deliberations, the jury sent the court the following note:

"Your Honor,

> We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors." (4061a, Docket Entry 322, #24).

In response to this note, which was not shown to counsel at the time, the trial judge assembled the jury and counsel in the courtroom. He referred only to the first sentence of the note and then, again without prior notice to or consultation with counsel, gave a "dynamite" charge for the third time (4017a-4019a, Tr. 15,154-55).[151] Although the court's two previous "dynamite" charges had followed the language set forth in *Fioravanti*, on this third occasion the trial judge significantly omitted the key phrase *"each of you must decide this case for yourself."* Moreover, the trial judge prefaced his instruction by again scolding the obviously deteriorating jury, saying "I have told you before and I am going to tell you again . . ." (4017a-4019a, Tr. 15,154-55, emphasis added).[152]

151. Defense counsel were not apprised of the full contents of the jury's note until they requested and obtained a copy from the clerk the next day. Therefore, at the time of the trial judge's third "dynamite" charge, counsel were unaware that the jury had reported itself so hopelessly deadlocked that only "compassion for fellow jurors" would produce a unanimous verdict.

152. The complete proceedings before the jury in response to their reported deadlock were as follows:

> "THE COURT: Ladies and gentlemen, you have advised me you don't think you can reach a unanimous verdict.
>
> Have you reached a verdict or are you able to on any of the defendants?
>
> THE FOREMAN: None.
>
> THE COURT: No?
>
> Good.

Immediately after retiring the jury for further deliberations, the trial judge announced to counsel that he had no intention of declaring a mistrial, that he was coming to the belief that "cutting off the deliberations at 6:30 at night" had been a mistake, and that he was "inclined to go back to the idea that they will . . . deliberate until 10:00" (4018a-4019a, Tr. 15,155). Defense counsel objected to such a procedure and pointed out the potential adverse impact which it might have on the fitness of the elderly members of the jury. The trial court responded with the remark that the trial had been an "expensive matter" (4018a-4019a, Tr. 15,155-56). Defense counsel thereupon objected to the harsh and demanding tone of the trial judge's charge (4021a, Tr. 15,159) and, on the basis of jury deadlock and exhaustion moved for mistrial, which motion was summarily denied (4020a-4022a, Tr. 15,157-59).[153]

152. (Cont'd.)

> *I have told you before and I am going to tell you again* it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement. Of course, you must do so without violation to individual judgment, [EACH OF YOU MUST DECIDE THIS CASE FOR YOURSELF—(omitted)] but only after an impartial consideration of the evidence in the case with your fellow jurors.
>
> You should not hesitate to re-examine your views and change your opinion, if convinced it is erroneous.
>
> Of course, you should not surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or solely for the mere purpose of reaching a verdict. *You will continue your deliberations.*" (4017a-4019a, Tr. 15,154-55, emphasis added).

153. The trial judge's concern over the time and expense of a new trial was an insufficient reason for requiring further deliberations by jurors who, after five days of deliberation and three "dynamite" charges, continued to have reasonable doubts. *See United States v. Burley*, 460 F. 2d 998, 1000 (3rd Cir. 1972). Before summarily ruling on the mistrial motion, the court should have given equal consideration to the deprivation of defendants' rights through coercion of the verdict.

On Monday, July 14, 1975, the seventh day of sequestered deliberations, the trial court informed defense counsel that it had received the following note:

"Your Honor,

> May I as foreman of the Jury meet with you to discuss the condition of the Jury and further guidance?
>
> G. W. Russell
> Foreman"

(4061a, Docket Entry 322, #25).

The trial judge stated that he would meet privately with the foreman and a court reporter, and would impound the transcript of such a conference (4022a-4023a, Tr. 15,164-65). However, if any counsel objected to any aspect of this procedure, the trial judge would "merely write him [the foreman] a note and say no" to the request for a meeting (4024a, Tr. 15,166-67). Thus, the trial court forced defendants to choose between deprivation of their right to be present at a critical stage of the proceedings, and rejection of the deadlocked jury's plea for guidance. Defendants were particularly concerned that, due to the jury's condition, rejection of their request would inevitably lead to a coerced verdict.

Caught in this dilemma, defendants did not object to the limited meeting as outlined by the trial judge (4028a-4029a, Tr. 15,172-73). However, defense counsel expressly informed the court that they would object to any instructions, including "any repetition of the modified Allen charge," being given to the foreman without prior notice or consultation with them (4024a-4026a, Tr. 15,167-68). The court thereafter met privately with the jury foreman and impounded the transcript of that meeting (4064a-4070a). Not until September 16, 1975, when this Court ordered disclosure of the transcript (4062a-4063a), did defendants learn what actually occurred in that conference.

During the meeting, the foreman told the trial judge that the jury's problems were *"health* and *the status of the count"* (4064a-4065a, R. Tr. 2, emphasis added). The ensuing discussion showed that the foreman was referring to the jury's deadlock when using the phrase "status of the count." The foreman made absolutely clear that the jury was hopelessly deadlocked by stating:

> "We have taken enough ballots now, and we have had enough discussions, and *the way it is divided is not going to be settled by any document, any remembrance of testimony.* It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no . . ." (4066a-4067a, R. Tr. 4, emphasis added).

Later in the conference the foreman again explained the jury's complete inability to reach a unanimous verdict:

> "MR. RUSSELL: I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.
>
> THE COURT: *Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?*
>
> MR. RUSSELL: *In my opinion, it is* . . ." (4068a, R. Tr. 6, emphasis added).

In addition to unequivocally communicating to the trial judge the jury's deadlock, the foreman also painted a

vivid picture of the severe physical and mental deterioration of the jury:

> "MR. RUSSELL: . . . I would like to thank you for that 6:30 [termination of deliberations], because *I don't think you would have a jury left.* I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say *at least eight of the jurors are taking some kind of pill.* Some of the pills have been issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen *one of these jurors at one time I thought she was going to jump out the window.* And I, just for my own sake, without telling you this, *I cannot take the responsibility that this could happen.* . . .
>
> THE COURT: May I ask this: If we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.
>
> MR. RUSSELL: I think there is more than that, Judge . . ." (4064a-4066a, R. Tr. 2-3, emphasis added).

As he had repeated his view that the jury was hopelessly deadlocked, the foreman also made a special point of later repeating his concern with the jury's health:

> "As I said, *the health problem is something that I think has to be looked at.* I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but *I think something ought to be done*" (4068a-4069a, R. Tr. 7, emphasis added).

Confronted with the foreman's repetitive pleading about the deteriorating condition of the jury and the futility of further deliberations in breaking a hopeless deadlock, the trial judge instructed the foreman to "tell [the jury] to keep deliberating and see if they can come to a verdict" (4070a, R. Tr. 8). The final exchange between the judge and the foreman demonstrates beyond question that by this time the court had clearly conveyed to the jury that he required a verdict and would not accept a deadlock:

> "MR. RUSSELL: . . . It is a situation *I don't know how to help you get what you are after.*
>
> THE COURT: Oh, I am not after anything.
>
> MR. RUSSELL: *You are after a verdict one way or the other.*
>
> THE COURT: *Which way it goes doesn't make any difference to me.*
>
> MR. RUSSELL: They keep saying, 'If you will tell him what the situation is, he might accept it.'
>
> I said, 'He doesn't want to know. He told me he doesn't want to know what the decision is.'
>
> THE COURT: No, I don't want to know that. It would not be proper for me to know.
>
> MR. RUSSELL: You may imply something from what I said.
>
> THE COURT: I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.
>
> MR. RUSSELL: I have told you as best I can.

THE COURT: Thank you. You tell them to keep deliberating and see if they can come to a verdict" (4069a-4070a, R. Tr. 7-8, emphasis added).

After this private meeting with the foreman, the court advised counsel that "the foreman has advised me that because of what he calls *personality differences* between some of the members of the jury . . . he does not feel that they are ever going to be able to get over this,"[154] and "he also pointed out there are some of the people that are not feeling well, but he says he is not a doctor and he doesn't know if they are sick or aren't sick." (4030a-4032a, Tr. 15,173-74, emphasis added).

The trial judge requested the views of counsel "as to how much longer I should let them deliberate" (4032a, Tr. 15,175). Incredibly, the government recommended that "we go through the rest of this week and the Court give serious consideration to going back to evening hours" (4032a-4033a, Tr. 15,176). Defendants moved for an immediate mistrial because of the jury deadlock and the danger of a coerced verdict (4032a-4035a, Tr. 15,175-78). The trial judge "deferred" ruling on the motion, indicating he wanted the jury to continue deliberating until Friday, July 18 (4034a, Tr. 15,177-78).

On the following morning, the eighth day of deliberations (Tuesday, July 15, 1975), the previously "hopelessly deadlocked" jury returned its verdicts of guilty as to each

154. Nowhere in the conference transcript did the foreman refer to "personality differences" as impeding deliberations at that time. On the contrary, the foreman explicitly stated that the prior personality conflicts had been overcome (4066a, R. Tr. 4). Nevertheless, when denying defendants' motion to release the impounded transcript, the trial judge reiterated that the foreman had "indicated . . . personality difficulties among some jurors" (87a), and also stated that disclosure of the transcript would be improper because it would indicate "a particular juror's views," another assertion unsupported by the actual transcript (86a-87a).

defendant.[155] It is apparent from the foregoing review of the relevant facts that these verdicts were the coerced product of juror illness and exhaustion, and were rendered long after any consideration of the evidence had ceased. Moreover, the jury *twice* expressed its inability to reach a unanimous verdict in language which could not have been clearer. In these circumstances, the trial court's failure to grant defendants' motions for mistrial was itself reversible error and, in addition, the trial judge committed reversible error by *directly* pressuring the jury into its verdicts.

B. The Trial Court Erred by Directly Pressuring the Jury Into Its Verdicts Through the Use of Repetitive and Erroneous "Dynamite" Instructions, Including One Improperly Given in a Private Meeting With the Jury Foreman.

In *United States v. Fioravanti, supra*, 412 F. 2d 407, this Court prospectively banned use of the traditional "*Allen*" or "dynamite" charge because of "its tendency to erode the jurors' capacity for meaningful group deliberation with its concomitant arguing, influencing, and exchange of views." *Id.* at 420. The opinion suggested that if there is "any disposition to instruct jurors to consult with

155. At this time the trial judge expressly forbade counsel to speak to any juror (4038a-4039a, Tr. 15,212). Defense counsel were thus precluded from ascertaining, among other things, what the foreman told the jury about his private meeting with the trial judge. All defendants moved for the right to interrogate the jurors, but the trial court denied that motion in an opinion dated August 14, 1975 (79a-89a, Docket Entry 353). Defendants other than Celotex and G-P did not renew in this Court their motion to interrogate the jurors because of their belief that the coercion of the jury verdict is clearly demonstrated in the present record, and that at this late date the opportunity to discover anything else about what really happened may have been lost. Defendants Celotex and G-P concur in this belief but have pursued the motion to interrogate the jurors for the reasons set forth in Celotex' separate brief.

others in the deliberative process . . . trial judges use . . ." the charge set forth at 412 F. 2d at 420, n. 32.

In the present case, the jurors were given a "dynamite" charge no less than *four* times.[156] In the circumstances of this case, the repeated use of any "dynamite" charge, however phrased, was serious error. The trial court then proceeded to compound that error by significantly modifying the charge the last two times it was given. The language noted in *Fioravanti* was first used in the body of the main charge (3949a-3950a, Tr. 14,949) and repeated again on the fifth day of deliberations (4013a-4014a, Tr. 15,145-46). However, on the sixth day of deliberations, after the jury had reported itself deadlocked (4061a, Docket Entry 322, #24), the trial court erroneously deleted from the *Fioravanti* language the significant phrase *"each of you must decide this case for yourself"* (4017a-4018a, Tr. 15,154-55). This improper omission ran afoul of the principle that "the permissibility of a direction to jurors to re-examine their views in the light of those of their fellows is *dependent* upon the moderating reminder of their own individual responsibility and *the necessity that any verdict be that of each of the jurors. . . .*" *United States v. Rogers*, 289 F. 2d 433, 437 (4th Cir. 1961) (emphasis added).[157] By thus substantively depart-

156. The trial court's giving such a charge first in the body of his final jury instructions and then on three subsequent occasions distinguishes this case from *Fioravanti* even without the significant departures from the *Fioravanti* language noted *infra*. Use of a "dynamite" charge was held not to be reversible error in *Fioravanti* because it "was incorporated into the body of the main charge . . .", *Id.* at 419, and because the charge had "heretofore been approved by this Court, albeit grudgingly. . . ." *Id.* at 419.

157. Significantly, *Rogers* was one of only three cases cited in support of the Supreme Court's decision in *Jenkins v. United States*, *supra*, 380 U. S. 445, 446. In *Fioravanti*, this Court similarly recognized the validity of the principle expressed in *Rogers* by stating: "We are convinced that the traditional measure of proof in criminal

ing from the language noted in *Fioravanti*, the trial court committed reversible error.[158]

Moreover, during his private meeting with the jury foreman on the seventh day of deliberations, the trial judge communicated his desire for a verdict without any of the protective language required by *Fioravanti*. This was accomplished in the context of responding to the foreman's pleading about the health and hopeless deadlock of the jury. The trial judge expressed to the foreman his belief that "[y]ou [the jury] have not deliberated that long yet" and "jurors usually deliberate until eleven or ten at night" (4067a-4068a, R. Tr. 5-6),[159] and *repeatedly* stated:

> "If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer—" (4066a, R. Tr. 4).
>
> "I would like this jury to deliberate longer" (4067a, R. Tr. 5).

157. (Cont'd.)
cases envisions a 'subjective standard'—viz. *each individual juror must be convinced* of the defendant's guilt beyond a reasonable doubt." 412 F. 2d at 419 (emphasis added).

158. "[T]rial courts should avoid substantive departures from the formulations of the charge that have already received judicial approval." *United States v. Flannery*, 451 F. 2d 880, 883 (1st Cir. 1971). The Seventh Circuit, the first to require use of a modified "*Allen*" charge like the one approved in *Fioravanti*, later found it necessary to require *strict* adherence by trial courts to the approved form, or suffer reversal. *United States v. Silvern*, 484 F. 2d 879, 883 (7th Cir. 1973).

159. The needless reference to the fact that "jurors usually deliberate until eleven or ten at night" may well have had the unfortunate consequence of suggesting that the trial court was considering again extending the hours of deliberation into the late evening. (On the previous day the trial judge had stated to counsel that he was in fact considering doing just that (4018a-4019a, Tr. 15,155)). The potential coercive impact of such a suggestion is best illustrated by the foreman's own words that if the jury had continued late evening deliberation "I don't think you would have a jury left." (4064a-4065a, R. Tr. 2).

"For the time being continue your deliberations" (4068a, R. Tr. 6).

"I would like you to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say" (4069a, R. Tr. 7).

"You tell them to keep deliberating and see if they can come to a verdict" (4069a-4070a, R. Tr. 8).

These statements cumulatively constituted an improperly abbreviated "dynamite" charge. *United States v. Bass*, 490 F. 2d 846 (5th Cir. 1974).[160] In *Bass* the trial court responded to a jury note indicating a verdict on certain counts, but a deadlock on others, by charging that "[o]n any count as to which you are not yet in unanimous agreement, I will ask you to return to the jury room and continue your deliberations." *Id.* at 854. In reversing the subsequently returned guilty verdicts, the Court of Appeals expressly rejected the contention that this instruction was not coercive because the jurors were merely sent back for further deliberations:

> "The note from the jury asked only if the stated verdict was acceptable. The district court's response could reasonably have created the impression in the mind of a reasonable juror that such a verdict was not acceptable. Indeed, the instruction indicates that only unanimous agreement is acceptable. Thus, in context, the supplemental instruction was merely an improperly abbreviated *Allen* charge. . . ." *Id.* at 854.

160. Prior to this private conference, defense counsel had expressly informed the trial court that they would object to any repetition of the "dynamite" charge (4024a-4025a, Tr. 15,167). During this private conference, the judge in effect gave an instruction on "reasonable doubt" as well (4066a-4068a, R. Tr. 4-5).

There can be no doubt that in this case the court conveyed to the jury the same impression—that only unanimous agreement would be acceptable—and that this impression was directly confirmed in the private conference with the foreman. Having just reported that the jury's division would not be settled by any evidence (4066a-4067a, R. Tr. 4), the foreman told the court he knew it was after a verdict "one way or the other," but that, in effect, the jury was pleading with the court to accept their hopeless deadlock. The judge confirmed the impression that he was pressing for a verdict, offered no other alternative, and directed the foreman to tell the jury "to keep deliberating and see if they can come to a verdict." (4069a-4070a, R. Tr. 8).

The ultimate coercive impact which the trial court's fourfold repetition of the "dynamite" charge must have had on the jury cannot be measured by merely dissecting the specific language used. These instructions must be viewed in the context of the circumstances then present, including the *manner* in which the instructions were given. The second "dynamite" charge was given after the jury was suffering from illness and exhaustion (see *supra* at 164-65), and was juxtaposed with the trial judge's admonishment of the jury for allegedly failing to understand his earlier instructions (4011a, Tr. 15,142; 4013a-4014a, Tr. 15,145-46). The third "dynamite" charge was given in response to the jury's own admission of deadlock (4061a), was prefaced with the irritable remark, "I have told you before and I am going to tell you again . . . ," omitted the key phrase, "each of you must decide this case for yourself" (4017a-4019a, Tr. 15,154-55; see *supra* at 174), and was delivered in a tone so harsh and demanding that defense counsel were forced to object (4021a-4022a, Tr. 15,159).

In effect, the trial court gave "a supplemental or 'dynamite charge' to blast a hung jury into a verdict." *United States v. Fioravanti, supra,* 412 F. 2d at 419.

Perhaps most prejudicial of all, the fourth "dynamite" instruction, delivered in language clearly departing from *Fioravanti,* was again given in response to the jury's own expression of deadlock (4066a-4067a, R. Tr. 4; 4068a, R. Tr. 6)—and this time in a private conference with the jury foreman over the prior objection of defense counsel.[161] The Supreme Court recently noted in *Rogers v. United States,* 422 U. S. 35, 45 L. Ed. 2d (1975), that both its earlier precedents and Federal Rule of Criminal Procedure 43 require supplemental jury instructions to be given in open court and in the presence of both defendant and his counsel. Similarly, this Court has also stated that "It is essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant." *United States v. Neal,* 320 F. 2d 533, 536 (3rd Cir. 1963) quoting from *United States v. Noble,* 155 F. 2d 315, 318 (3rd Cir. 1946). In *Noble* this Court stated that the two important purposes of this rule are: (1) to give defendant and his counsel an opportunity to hear the instructions and, if they are incorrect, to object to them and secure their prompt correction; [162] and (2) to make certain that

161. Faced with the Hobson's choice forced upon them by the trial judge of waiving their constitutional right to be present at the meeting between the trial judge and the foreman or not waiving that clear right and risking the complete alienation of the jury and a quickly coerced verdict (*see supra* at 168-69), defendants' consent to the private conference cannot be construed as consent to a fourth "dynamite" charge outside their presence, something to which defense counsel had expressed their opposition (4024a-4025a, Tr. 15,167).

162. The trial judge gave all four "dynamite" instructions without prior notice to or consultation with defense counsel, thus precluding their opportunity to provide any meaningful input. Such prior notice or consultation would have permitted counsel to argue

each member of the jury has actually received the instructions. Neither of these two purposes was served in this instance and, of course, in what form the jury foreman relayed the fourth "dynamite" charge to the other jurors remains a total unknown.[163]

In *United States v. Gullia,* 450 F. 2d 777 (3rd Cir. 1971), the trial judge met with a single juror and, as here, encouraged her to reach a verdict. In contrast to the present case, counsel were present at the meeting in *Gullia* and were permitted to object to the instructions given. Nevertheless, this Court reversed the conviction and held:

> "We find that it was not only irregular, but error to give additional instructions to the extent and of the type here given to one juror in the absence of the remaining jurors. 'Undoubtedly communications between the court and the jury should be made in the presence of all the jurors . . .'." *Id.* at 779.

Although the failure to follow the procedure of only giving instructions in open court is "presumptively injurious," *Snyder v. Lehigh Valley R. R. Co.,* 245 F. 2d 112, 116 (3rd Cir. 1957) (*en banc*), and *see Ah Fook Chang v. United States,* 91 F. 2d 805, 810 (9th Cir. 1937), in the present case this Court need not merely "presume" prejudice. It is undisputed that the jury itself reported a hopeless deadlock on two occasions (4061a, Docket

162. (Cont'd.)
the wisdom of repeating these instructions before the damage was done or to request inclusion of a statement that the jury also had the right to disagree. *See United States v. Alper,* 449 F. 2d 1223 (3rd Cir. 1971).

163. The trial court's prohibition against allowing defense counsel to speak to the jurors following the verdict (4038a-4039a, Tr. 15,212) has left unanswered this critical question of what the jury foreman stated to the jury about the instructions he received from the trial judge in the private conference.

Entry 322, #24; 4017a-4018a, Tr. 15,154; 4066a-4067a, R. Tr. 4; 4068a, R. Tr. 6), and expressed the fact that the deadlock could not be broken by further consideration of the evidence (4066a-4067a, R. Tr. 4; 4068a, R. Tr. 6) but only by "compassion" for fellow jurors (4061a, Docket Entry 322, #24). It is also beyond dispute that the cumulative effect of the trial court's erroneous conduct conveyed to the jury the fact that the judge *required* a verdict and would not accept a deadlock. As the jury foreman stated to the trial judge: "You are after a verdict one way or the other" (4068a-4069a, R. Tr. 7).[164] In these circumstances, it is apparent that the informal and erroneous supplemental instructions that were given at this meeting must have had a significant prejudicial impact. Indeed, it is not a coincidence that this "hopelessly deadlocked" jury was suddenly able to return a verdict within a few hours after this meeting.[165]

By thus coercing a deadlocked jury into a verdict, the trial court erroneously ignored the fact that a jury should not return a verdict when there is a lack of unanimity.

164. The trial court's only response to this comment was merely that he didn't care which way the verdict went (4068a-4069a, R. Tr. 7), thus reinforcing the impression that some verdict was necessary.

165. Strong evidence of the trial judge's pressure for a verdict is his suggestion to Foreman Russell that perhaps the deadlock could be broken by excusing a holdout juror:

> "THE COURT: May I ask this: If we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that there is no point" (4065a-4066a, R. Tr. 3).

Since defendants had stipulated to accept a verdict by eleven jurors early in the trial, it seems fair to suggest the judge was telling Russell that if only one "holdout" was hanging the jury, that juror could be excused for health reasons. The suggestion of excusing a juror who might be holding out typifies the court's desire for a verdict regardless of individual rights. Indeed, merely inquiring into the division of the jurors is, in itself, plain, reversible error. *Brasfield v. United States*, 272 U. S. 448 (1926).

This principle is a vitally important corollary to the rule that any verdict must be that of *each* juror. As this Court stated in *Fioravanti*:

> "So long as the unanimous verdict is required in criminal cases, there will always be *three* possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) *no verdict because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty.* And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, *it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict.*" (412 F. 2d at 416, emphasis added).[166]

The combination of the judge's failure to charge that the jury could remain deadlocked and his comments to the foreman must have had an even greater coercive impact than the statement, "You have got to reach a decision in this case," condemned in *Jenkins v. United States*, 380 U. S. 445, 446 (1965). In *Jenkins*, the judge's statement was found to be coercive and to constitute plain error even where the unsequestered jury had deliberated only slightly

166. The lower court failed to instruct the jury at any time that a third, and equally acceptable, alternative to guilty or not guilty verdicts would be *no verdict because of a lack of unanimity*. The failure to so charge, combined with four "dynamite" charges, given without notice to defendants, effectively conveyed to the ill, exhausted and hopelessly deadlocked jury that they had no alternative but to continue to deliberate until they reached a verdict. *See United States v. Angiulo*, 485 F. 2d 37, 40 (1st Cir. 1973), where the First Circuit promulgated the requirement that informing the jury of its right to disagree is a necessary component of any "dynamite" charge.

more than two hours when the comment was made and where there was no indication that illness, fatigue, exhaustion, or other physical or mental problems contributed to the coercive effect upon the jurors.[167] Here, the cumulative coercive conduct of the trial judge was unleashed upon a physically and mentally exhausted jury which had reported itself hopelessly deadlocked on at least two occasions. The jury was unable to reach a verdict during seven days of sequestered deliberations despite repeated "dynamite" charges and the failure ever to instruct them of their right to remain deadlocked. The trial judge insisted on continued deliberations without any indication of possible termination other than by a verdict "one way or the other" and communicated that insistence in his private conference with the foreman. Thus, the interaction between the trial judge's conduct and a physically exhausted, "hopelessly deadlocked" jury, produced coerced verdicts.

• • • • • •

The trial court's failure to grant a mistrial and its resort to coercive tactics to secure a verdict was the capstone of a trial which, as shown above, was grounded from the outset on a fundamentally erroneous view of the important legal issues, including the "core issue" of verification; which was plagued with numerous erroneous evidentiary rulings and improper "comments" by the trial judge; and which was infected with grave misconduct by the prosecution. Superimposed over a case of circumstantial evidence far too insubstantial to support an inference of the offense charged, the trial resulted in and was itself a serious miscarriage of justice. The verdicts must be reversed.

---

167. *See Jenkins v. United States*, 330 F. 2d 220 (D. C. Cir. 1964).

CONCLUSION.

For all the foregoing reasons, the judgments below must be reversed and acquittals granted. In the alternative, a new trial must be ordered.

Respectfully submitted,

ROBERT C. KECK
JAMES G. HIERING
VALENTINE A. WEBER, JR.
KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
Chicago, IL 60606
Counsel for United States Gypsum Company

H. FRANCIS DELONE
ALFRED W. CORTESE, JR.
JOHN F. WILSON, III
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Counsel for National Gypsum Company

CLOYD R. MELLOTT
WILLIAM B. MALLIN
BARTON Z. COWAN
J. GARY KOSINSKI
D. RICHARD FUNK
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, PA 15219
Counsel for Georgia-Pacific Corporation

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
JOSEPH R. LUNDY
SCHIFF, HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
Counsel for The Celotex Corporation

PAUL C. WARNKE
THOMAS RICHARD SPRADLIN
CLIFFORD, WARNKE, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for Messrs. Colon Brown and J. P. Nicely

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Counsel for Andrew J. Watt

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

Nos. 75-1836 through 75-1842.

UNITED STATES OF AMERICA,
Appellee,

v.

UNITED STATES GYPSUM COMPANY,
Appellant in 75-1836,
NATIONAL GYPSUM COMPANY,
Appellant in 75-1837,
GEORGIA-PACIFIC CORPORATION,
Appellant in 75-1838,
THE CELOTEX CORPORATION,
Appellant in 75-1839,
COLON BROWN,
Appellant in 75-1840,
J. P. NICELY,
Appellant in 75-1841,
ANDREW J. WATT,
Appellant in 75-1842.

Appeals From the Verdict, Sentence and Final Judgment of the United States District Court for the Western District of Pennsylvania (Criminal No. 73-347).

APPELLANTS' JOINT REPLY BRIEF.

(See Inside Front Cover for Listing of Counsel)

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

ROBERT C. KECK
JAMES G. HIERING
VALENTINE A. WEBER, JR.
KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
Chicago, IL 60606
Counsel for United States Gypsum Company

H. FRANCES DELONE
ALFRED W. CORTESE, JR.
JOHN F. WILSON, III
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Counsel for National Gypsum Company

CLOYD R. MELLOTT
WILLIAM B. MALLIN
BARTON Z. COWAN
J. GARY KOSINSKI
D. RICHARD FUNK
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, PA 15219
Counsel for Georgia-Pacific Corporation

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
JOSEPH R. LUNDY
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
Counsel for The Celotex Corporation

PAUL C. WARNKE
THOMAS RICHARD SPRADLIN
CLIFFORD, WARNKE, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for Messrs. Colon Brown and J. P. Nicely

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Counsel for Andrew J. Watt

INDEX TO BRIEF.

	Page
Introduction	1
I. Agreements to Exchange Competitive Information for Lawful Purposes Do Not Violate the Sherman Act Even Though Their Natural Effect May Be to Stabilize Prices	3
A. Reciprocal Exchanges of Competitive Information Do Not Constitute Per Se Price-Fixing Agreements	4
B. It Is Lawful to Verify Customer Reports of Lower Competitive Offers in Order to Avoid Violations of the Robinson-Patman Act Even if Such Verification Tends to Stabilize Prices	10
C. Substantial Evidence of Lawful Purposes Made the Failure to Give a Proper Charge Clearly Prejudicial	15
II. The Evidence Is Insufficient, as a Matter of Law, to Prove the Conspiracy Charged in the Indictment	18
A. The Sporadic Episodes Emphasized by the Prosecution Raise No Inference of the Conspiracy Charged Because They Are Not Connected and Are Frequently Inconsistent	18
B. There Was No Agreement to Verify Among Defendants After 1968 and the Limited Verification in the Statutory Period Did Not Have Any Stabilizing Effect on Prices	20
C. The Record Does Not Support the Prosecution's Claims That Specific Alleged Statutory Period "Episodes" Were Pursuant to Any Agreement	26
1. The May 1969 List Price Change	26
2. The 1971 Elimination of Wooden Pallets in Michigan	28
3. Republic Gypsum	29
4. The Alleged Continuation of 1966 Credit Terms	31

INDEX TO BRIEF (Continued).

	Page
D. The Prosecution Cannot Remedy the Absence of Evidence of Conspiracy by Prejudicially Referring to Matters Dehors the Record and by Claiming Concealment	32
III. Defendants Were Severely Prejudiced by the Trial Court's Repeated Errors and Its Partiality Toward the Prosecution	34
A. Dismissal of the Indictment Is Required Because the Defendants Were Severely Prejudiced by the Prosecution's Excessive Pre-Indictment Delay	34
1. The Prosecution Unduly Delayed Commencing This Prosecution	34
2. Defendants Suffered Actual Prejudice as a Consequence of the Prosecution's Pre-Indictment Delay	36
B. The Trial Court Prejudicially Refused to Give a Proper Final Charge on Key Conspiracy Law Principles	37
C. The Jury Verdict Was Contaminated by Consideration of Incompetent, Inflammatory Hearsay Evidence	44
D. The Trial Court's Partiality to the Prosecution Necessarily Prejudiced Defendants	47
IV. The Prosecution Has Admitted Its Misconduct and Its Justifications for Such Abuses Are Without Merit	50
V. The Trial Judge Improperly Coerced the Verdict by Conveying to the Jury That a Deadlock Was Impermissible	57
Conclusion	60

TABLE OF CITATIONS.

Cases:	Page
American Column & Lumber Co. v. United States, 257 U. S. 377 (1921)	7
American National Bank & Trust Co. v. Aetna Insurance Co., 447 F. 2d 680 (7th Cir. 1971)	39
Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933)	8, 9
Automatic Canteen Co. v. FTC, 346 U. S. 61 (1953)	13
Belliston v. Texaco, Inc., 455 F. 2d 175 (10th Cir. 1972), cert. denied, 408 U. S. 928 (1972)	10, 11, 12, 13
Bollenbach v. United States, 326 U. S. 607 (1946)	43
Cement Mfrs. Protective Ass'n v. United States, 268 U. S. 588 (1925)	3, 4, 5, 6, 9, 14, 16, 17
Chicago Board of Trade v. United States, 246 U. S. 231 (1918)	5, 9
DiMarco, et al. v. U. S. G. et al., E. D. Pa., CA #31766	12
Dunn v. United States, 307 F. 2d 883 (5th Cir. 1962)	55
Fashion Originators' Guild of America v. FTC, 312 U. S. 457 (1941)	7
FTC v. A. E. Staley Mfg. Co., 324 U. S. 746 (1945)	12
Gaither v. United States, 413 F. 2d 1061 (D. C. Cir. 1969)	55
Gray v. Shell Oil Co., 469 F. 2d 742 (9th Cir. 1972), cert. denied, 412 U. S. 943 (1973)	10, 11, 12, 13
Green v. Reading Co., 183 F. 2d 716 (3rd Cir. 1950)	39
Klein v. American Luggage Works, Inc., 323 F. 2d 787 (3rd Cir. 1963)	44
Kotteakos v. United States, 328 U. S. 750 (1946)	38, 39, 40
Lear v. Bawden, 75 Colo. 385, 225 P. 831 (1924)	16
Maple Flooring Mfrs. Ass'n. v. United States, 268 U. S. 563 (1925)	3, 5, 7, 8, 9
Moline Plow Co. of Kansas City v. Carson, 72 Fed. 387 (8th Cir. 1895)	16
Morissette v. United States, 342 U. S. 246 (1952)	6
NBO Industries Treadway Companies, Inc. v. Brunswick Corp., 1973-2 CCH Trade Cases ¶ 60,479 (3rd Cir. 1973)	43

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Rimling v. Scherper, 206 Wis. 532, 240 N. W. 159 (1932) ... 16
Rivers v. Union Carbide Corp., 426 F. 2d 633 (3rd Cir. 1970) 45
Smith, Kline & French Co. v. Smith, 166 Pa. 563, 31 A. 343 (1895) ... 16
State of Arizona v. Cook Paint & Varnish Co., 1975-2 Trade Cases, CCH Trade Reg. Rep. ¶ 60,450 (D. Ariz. 1975) .. 28
Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 (1912) ... 6, 8
Stuart v. Lester, 1 N. Y. S. 699 (1888) ... 16
Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936) .. 8
Texas Gypsum Co. v. United States Gypsum Co., et al., Civil Action No. 2391 (W. D. Tex., filed March 20, 1962) 12
United States v. American Linseed Oil Co., 262 U. S. 371 (1923) ... 7
United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 (3rd Cir. 1970) ... 46, 56
United States v. Barket, 530 F. 2d 189 (8th Cir. 1976) .. 34, 35, 36, 37
United States v. Basurto, 497 F. 2d 781 (9th Cir. 1974) ... 27, 47
United States v. Bertolotti, 529 F. 2d 149 (2nd Cir. 1975) ... 38
United States v. Borelli, 336 F. 2d 376 (2nd Cir. 1964), cert. denied, 379 U. S. 960 (1965) ... 37, 38, 39, 40
United States v. Citizens & Southern Nat'l Bank, 422 U. S. 86 (1975) ... 3, 4, 5, 6
United States v. Container Corp., 393 U. S. 333 (1969) 4, 5, 6, 10, 16, 20
United States v. DeCavalcante, 440 F. 2d 1264 (3rd Cir. 1971) ... 18
United States v. FMC Corp., 306 F. Supp. 1106 (E. D. Pa. 1969) ... 8
United States v. Fioravanti, 412 F. 2d 407 (3rd Cir. 1969), cert. denied sub nom. Panaccione v. United States, 396 U. S. 837 (1969) ... 57, 58
United States v. Graham, 325 F. 2d 922 (6th Cir. 1963) ... 55
United States v. Griffith, 334 U. S. 100 (1948) ... 6

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

United States v. Grosso, 358 F. 2d 154 (3rd Cir. 1966), Rev'd. 390 U. S. 62 (1968) ... 59
United States v. Hayward, 420 F. 2d 142 (D. C. Cir. 1969) .. 55
United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S. D. N. Y. 1951) ... 45
United States v. Johns-Manville Corp., Cr. 21-115 (E. D. Pa. 1962) ... 39
United States v. Masonite Corp., 316 U. S. 265 (1942) ... 7, 8
United States v. Patten, 226 U. S. 525 (1913) ... 6
United States v. Silver, 457 F. 2d 1217 (3rd Cir. 1972) ... 43
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940) ... 5, 6, 56
United States v. Standard Oil Co., 316 F. 2d 884 (7th Cir. 1963) ... 44
United States v. Tucker, 267 F. 2d 212 (3d Cir. 1959) ... 55
United States v. Van de Carr, 343 F. Supp. 993 (C. D. Cal. 1972) ... 27, 47
United States v. Vicars, 467 F. 2d 452 (5th Cir. 1972), cert. denied 410 U. S. 967 (1973) ... 38
Venzie Corp. v. U. S. Mineral Products Co., 521 F. 2d 1309 (3rd Cir. 1975) ... 27
Virgin Islands v. Carmona, 422 F. 2d 95 (3rd Cir. 1970) 43
Virgin Islands v. Gereau, 502 F. 2d 914 (3rd Cir. 1974), cert. denied, 420 U. S. 909 (1975) ... 59
Viviano Macaroni Co. v. FTC, 411 F. 2d 255 (3rd Cir. 1969) 12
Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N. D. Cal. 1971) ... 10, 11, 12, 13, 14, 15, 16, 17, 35, 36
Webster v. Sinclair Refining Co., 338 F. Supp. 248 (S. D. Ala. 1971) ... 10, 13

Miscellaneous:

ABA Jury Instructions in Criminal Antitrust Cases, 482 (1965) ... 39
Baron, Federal Practice and Procedure, Vol. 4, ¶ 2235 ... 39
F. R. Cr. P. 30 ... 39, 41

TABLE OF CITATIONS (Continued).

Miscellaneous (Continued): Page

Report of the Attorney General's National Comm. to Study the Antitrust Laws, 181 (1955) 14

Robinson-Patman Act 8, 10, 12, 13, 15

Sherman Act:

Generally 5, 10, 13

Section 1 ..... 6, 7

8 Moore's Federal Practice, 2d ed. ¶ 30.03[2] 41

INTRODUCTION.

The prosecution's brief itself characterizes the evidence as relating to many claimed antitrust agreements with different and often inconsistent scopes and objectives (P. B. 66-173).[1] Most of these alleged agreements were purportedly formed well prior to the statute of limitations period. To tie these multi-faceted alleged agreements together for the purpose of asserting the unitary price-fixing conspiracy charged, the prosecution claims that it proved a continuing agreement to "verify" or exchange competitive business information which had the effect of stabilizing prices (P. B. 15-16).

The prosecution's own description of the evidence thus confirms the grievous error committed by the trial court in requiring the jury to disregard abundant evidence that defendants' purposes for exchanging such information were lawful, if the jury found the exchanges had a price-stabilizing effect. Moreover, the shifting, frequently contradictory objectives which the prosecution ascribes to its "multi-faceted agreements" confirm the absence of substantial evidence of the formation of any such agreements and the failure to connect them to any single, continuing price-fixing conspiracy extending into the statutory period. Though the absence of substantial evidence supporting the charges should have been immediately discernible, the jury's difficult task in addressing these issues was made an impossible one by the trial court's refusal to give essential instructions on accepted principles of conspiracy law, by the fact that the evidence properly submitted for jury consideration was obscured by stale, irrelevant and incompetent evidence which should not have been admitted, and by the trial court's partiality and the prosecution's misconduct. The conclusive proof of the jury's extreme diffi-

1. The Brief for Appellee United States of America is cited as "P. B. —." Appellants' Joint Brief is cited as "J. B. —."

culty is found in the jury's eventual description of a true deadlock which was broken only by the coercive intrusion of the trial court.

In view of the insufficiency of the evidence and the major trial errors committed below, these verdicts cannot stand. Accordingly, judgments of acquittal should be entered in favor of all defendants, or, in the alternative, new trials granted.

I. Agreements to Exchange Competitive Information for Lawful Purposes Do Not Violate the Sherman Act Even Though Their Natural Effect May Be to Stabilize Prices (J. B. I; P. B. II).

The trial court instructed the jury that defendants' exchanges of competitive information were violative of section 1 of the Sherman Act if they had a stabilizing effect on prices regardless of the purposes for the exchanges. In addition, the jury was told to presume, as a matter of law, that defendants' purpose was unlawful if the jury found that the price exchanges had the effect of stabilizing prices (3884a-3885a, Tr. 14,858-59; J. B. 51-55; P. B. 236-42).

This instruction is clearly erroneous unless, as the prosecution contends, *all* agreements to exchange competitive information violate the Sherman Act regardless of their purposes, so long as their effect is to stabilize prices.[2] Just last term, however, the Supreme Court ruled squarely contrary to the prosecution's contention. *United States v. Citizens & Southern Nat'l Bank*, 422 U. S. 86, 113, 116 (1975).[3] In that decision, the Court reaffirmed the fifty-year old principle that "dissemination of price information is not itself a *per se* violation of the Sherman Act" and held that agreements to exchange information which result in the "lack of significant price competition" are nonetheless lawful when done for a "permissible reason". *Id.* at 113-114.[4] Since

2. The prosecution has had to adopt such an extreme position in an effort to justify the error in the charge. In so doing, it finds itself at odds with its own requested instruction on this point, which the trial court changed by substituting "effect" for "purpose" (See J. B. 54-55). Defendants do not concede the existence of any "agreement" to exchange competitive information. Since there is abundant evidence in the record that the exchanges of information were for proper purposes, it makes no difference whether the exchanges were, or were not, pursuant to any "agreement".

3. Hereafter cited as "*C&S Bank*".

4. The *C&S Bank* decision explicitly relied on *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U. S. 563 (1925), *Cement Mfrs.*

agreements to exchange competitive information are not *per se* offenses, evidence of "purpose" is critical and, as *Cement* and *C&S Bank* hold, sometimes controlling, because it often is the only element separating lawful from unlawful information exchanges. Thus, the failure of the trial court to permit the jury to consider evidence of purpose, once a stabilizing effect was attributed to defendants' information exchanges, constitutes grossly prejudicial error on the most vital issue in dispute.

A. Reciprocal Exchanges of Competitive Information Do Not Constitute Per Se Price-Fixing Agreements. (J. B. I.A.; P. B. II.A., II.C.3)

The prosecution argues that because price-fixing schemes may include as their object the stabilization of prices, any agreement to exchange competitive information which produces a stabilizing effect on prices is illegal because "price stabilization is but one form of price fixing" (P. B. 232-33). Thus, it is contended that all agreements to exchange competitive information which tend to stabilize prices are illegal regardless of their purpose (P. B. 231-32, 236, 241) and that the actual purposes for them are "irrelevant" (P. B. 240). These extreme propositions cannot be supported.[5]

4. (Cont'd.)
Protective Ass'n v. United States, 268 U. S. 588 (1925), and the concurring opinion in *United States v. Container Corp.*, 393 U. S. 333, 338 (1969).

5. In arguing that purpose is irrelevant in a price-fixing case, the prosecution fails to distinguish between the immediate purpose of concerted action which characterizes it as a *per se* offense (*e.g.*, a purpose to fix prices) and the attempted justification once price fixing has been established (*e.g.*, fixed prices were fair and reasonable). The issue in this case is not whether price fixing is justified, but whether there was price-fixing in the first place. This necessarily requires the jury to find a purpose to fix prices—the very fact which the trial court instructed the jury to presume.

According to the prosecution, *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) holds that information exchanges which actually stabilize prices are illegal regardless of their purpose, that *Maple Flooring* and *Cement* should be limited to their "precise facts" and that since *Socony* the Supreme Court "has never indicated a contrary view" (P. B. 269). The prosecution is flatly wrong.

In *C&S Bank* the Supreme Court relied upon the continued vitality of both *Maple Flooring* and *Cement* in approving a "constant and detailed" exchange of information on prices which resulted in a lack of significant price competition between affiliated, but competing, banks. *United States v. Citizens & Southern Nat'l Bank*, *supra*, 422 U. S. at 113-14, 116. Although the government contended the arrangement constituted tacit price fixing condemned by *Socony*, the Court rejected a *per se* approach. 422 U. S. at 113. The Court determined that the information exchanges were justified by a "permissible reason" and that they did not, therefore, violate section 1.[6] 422 U. S. at 113, 116-19.

As the Court states in *C&S Bank*, the Container decision does not establish a *per se* rule condemning agreements to exchange competitive information which result in stabilized prices as tacit price-fixing agreements or their equivalent. *United States v. Container Corp. of America*, *supra*, 393 U. S. at 338-39 (concurring opinion). In strik-

6. Significantly, both the majority and dissenting opinions in the *C&S Bank* case cited *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918) as the standard by which information exchanges should be measured. *United States v. Citizens & Southern Nat'l Bank*, *supra*, 422 U. S. at 113, 116, 143. The classic statement of the rule by Justice Brandeis in *Board of Trade*, expressly included "the purpose or end sought to be attained" among the "relevant facts" to be considered in determining whether or not a particular restraint violates the Sherman Act. 246 U. S. at 238.

ing down the *Container* exchanges, the Court there recognized that such exchanges might be lawful under certain "controlling" circumstances, such as those present in *Cement*, but found those circumstances to be absent. 393 U. S. at 335. The *Container* decision thus considered both the purpose *and* effect of the exchanges in reaching its conclusion.[7]

Far from deciding that proof of a stabilizing effect on prices necessarily condemns any cooperative arrangement between competitors, the Supreme Court in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 (1940), decided the case on the explicit premise that proof of a purpose to fix prices was required to prove a criminal price-fixing conspiracy:

7. The prosecution is plainly wrong in contending that because a violation of section 1 is a general, not a specific, intent crime, proof that an agreement has had the condemned effect is sufficient to establish a violation of section 1 (P. B. 231-32). The very cases cited by the prosecution confirm that purpose is a necessary element of the offense. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912) held that where there is a *purpose* to fix prices, good intentions that may have motivated the price fixing are irrelevant. *United States v. Griffith*, 334 U. S. 100 (1948), involved the use of monopoly power in violation of the Sherman Act, not the inferring of an unlawful purpose with respect to exchanges of information. In *United States v. Patten*, 226 U. S. 525 (1913), the price-fixing purpose of the defendants' agreement was undisputed, 226 U. S. at 540-41, 543, the only question being whether that agreement had the effect of restraining trade. Here the threshold element of a price-fixing purpose is the very point at issue. The trial court's instruction that such an unlawful purpose could be "presumed, as a matter of law" from the existence of more stable prices improperly took that critical issue from the jury. *Cf. Morissette v. United States*, 342 U. S. 246, 274-76 (1952). The principle that "conspirators must be held to have intended the necessary and direct consequences of their acts," *United States v. Patten, supra*, 226 U. S. at 543, cannot apply where those consequences are not necessarily unlawful. Since the Supreme Court has declared in *C&S Bank* that stable prices resulting from exchanges of information do not necessarily constitute price fixing, a purpose to fix prices cannot be presumed from the existence of such a stabilizing effect.

> "Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it."

In its opinion, the Court repeatedly stressed that the oil companies' "chief end and objective" was the raising and fixing of prices. 310 U. S. at 190, 219, 249, and 253.

Analysis of the prosecution's citations demonstrates that evidence of purpose is a necessary element in Sherman Act cases. In the two decisions in which information exchanges were disapproved, the Supreme Court determined that the actual purpose of the exchanges was to suppress price competition. Thus, in *American Column & Lumber Co. v. United States*, 257 U. S. 377, 405, 407, 409-10 (1921), the Court determined that the defendants, by agreement, were pursuing a common, "persistent" purpose to restrict production and increase prices. In *United States v. American Linseed Oil Co.*, 262 U. S. 371, 390 (1923), the Court determined that, in requiring adherence by competitors to their published prices, the defendants' "manifest purpose was to defeat the Sherman Act. . . ." Subsequent opinions have characterized the *American Linseed Oil* decision as turning on an *agreement for price maintenance* accompanied by exchanges of information which had as their "one purpose and effect" the restraint of competition. *Maple Flooring Mfrs. Ass'n v. United States, supra*, 268 U. S. at 582; see also *Fashion Originators' Guild of America v. FTC*, 312 U. S. 457, 465 (1941).

The remainder of the prosecution's cases also emphasize the importance of considering both purpose *and* effect in section 1 cases. In *United States v. Masonite Corp.*,

316 U. S. 265, 274-76 (1942), the Court held that the use of *del credere* agency agreements constituted price fixing since all participants were aware that the purpose of the agreements was to delegate to Masonite the right to fix the prices at which the others sold. In *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 597-601 (1936), the Court cited *Maple Flooring, Cement,* and *Appalachian Coals* approvingly but condemned the agreements because defendants had agreed to adhere to their published prices. The interference by agreement with competitors' rights to enter into future contracts at prices individually determined by them was also the crux of illegality found in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 47 (1912), and *United States v. FMC Corp.*, 306 F. Supp. 1106, 1144 (E. D. Pa. 1969).[8] Both cases found a "purpose and effect" to stabilize the market, 226 U. S. at 48; 306 F. Supp. at 1147.

The Supreme Court authority establishing without exception that the "purpose" of information exchanges is relevant and, in certain instances "controlling", has forced the prosecution to contrive support for its contrary view. In its brief (P. B. 232), the prosecution quotes only the first few words of a sentence from *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 372 (1933), to suggest improperly that evidence of purpose is irrelevant where an agreement has the effect of stabilizing prices. However, the full sentence establishes that evidence of "intent" is relevant.

> "Good intentions will not save a plan otherwise objectionable, *but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences.*"[9] (Emphasis supplied to show deletion by prosecution.)

8. Defendants' verification exchanges did not comprehend any "agreement" to adhere to particular prices or otherwise restrain another seller's freedom. A seller was free to react as it wished to the information it received subject only to the constraints of the Robinson-Patman Act and other applicable laws.

The *Appalachian Coals* decision actually sustained a joint selling arrangement between competitors on authority of both *Maple Flooring* and *Cement*, declaring that the ". . . acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result." 288 U. S. at 374.

The foregoing authorities establish that, contrary to the prosecution's arguments:

> (1) Agreements to exchange competitive information which stabilize prices do not constitute *per se* price fixing;
>
> (2) Evidence of the purpose for such exchanges is always critical in determining whether the exchanges are lawful or unlawful; and,
>
> (3) Certain purposes or "permissible reasons" may constitute "controlling circumstances" establishing the legality of such exchanges notwithstanding a stabilizing effect on prices.

9. The quoted passage in *Appalachian Coals* is a paraphrase of a portion of Justice Brandeis' opinion in *Chicago Board of Trade, supra*, 246 U. S. at 238, which makes clear that both purpose and effect, among other circumstances, should be determined in evaluating whether a particular practice constitutes a restraint of trade.

B. It Is Lawful to Verify Customer Reports of Lower Competitive Offers in Order to Avoid Violations of the Robinson-Patman Act Even if Such Verification Tends to Stabilize Prices. (J. B. I.A.; P. B. II.A., II.C.3)

Four federal courts have ruled that information exchanges between competitors are lawful if done for the purpose of satisfying the Robinson-Patman Act's good faith meeting competition defense. *Belliston v. Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied* 408 U. S. 928 (1972); *Gray v. Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973); *Webster v. Sinclair Refining Co.*, 338 F. Supp. 248 (S. D. Ala. 1971); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N. D. Cal. 1971). Each decision explicitly holds that the lawful purpose of meeting competition in good faith, as required by the Robinson-Patman Act, constitutes a "controlling circumstance" under the *Container* decision and that information exchanges or verification among competitors for that purpose are not violative of the Sherman Act.

Despite these unequivocal holdings, the prosecution seeks to sustain criminal convictions on the ground that such a purpose is "irrelevant" and that the precedents are mistaken. Not even the vagaries of antitrust law enforcement should countenance, as did the trial court's charge, the imposition of criminal liability for conduct which was expressly approved by four federal courts prior to the return of the Indictment. Were such a change of law to be effected, the problems of notice and retroactivity would be of constitutional proportions (See J. B. 58, n. 2 and Nicely B. 18-21).

The prosecution's argument that *Wall Products* is wrong and that *Belliston*, *Gray*, and *Webster* are distinguishable does not withstand analysis. The latter three decisions unreservedly embrace the *Wall Products* rationale; and in *Belliston* the Tenth Circuit declared: "The rationale of the *Wall Products* case is applicable here." 455 F. 2d at 182.

Moreover, in *Gray*, the plaintiffs did argue a stabilizing effect due to verification, but the exchanges of price information were nonetheless approved because defendant's purpose was lawful:

> "They [plaintiffs] say that Shell exchanged price information with other major suppliers, resulting in identical wholesale prices, which moved up and down in tandem, and they brand these procedures as horizontal price-fixing *per se*, . . .
>
> ". . . They then attempt to demonstrate that there was literally no variation in wholesale price levels in the given competitive area. . . . By thus keeping the major competitors in line on the reduced prices, there could be no erosion of the market share of any of them." [10] (469 F. 2d at 746).

Analyzing the "totality of circumstances," including the claimed stabilizing effect, the *Gray* court held that legality turned on Shell's purpose for verifying:

> "On the totality of circumstances in this case, it was up to the jury to decide whether Shell's price inquiries were made in connection with a plausible

10. The prosecution completely overlooks the *Gray* court's recital in its opinion of the plaintiffs' argument that there was a stabilizing effect from verification and erroneously asserts that, "[S]o far as the opinion indicates, there was no evidence or argument that the exchanges had the stabilizing effect condemned by the Sherman Act" (P. B. 263).

> belief that it was conforming to its legal obligations or, whether the inquiries were made for some unlawful purpose, such as price fixing." (469 F. 2d at 747).

The court expressly determined that nothing in the instructions would permit the jury to excuse conduct which would be otherwise illegal.[11]

Rather glibly, the prosecution urges that the Robinson-Patman Act does not require verification between competitors. As Judge Zirpoli observed in rejecting a similar denigration of the meeting competition defense, such an argument reduces merely to the assertion that, if the prosecution ran defendants' businesses, they "would have elected to be less responsible in their compliance policies." *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. at 313, n. 10. While it may be expedient for the prosecution to argue that defendants' compliance policies went beyond the required minimum, the fact is that the defendants faced severe threats of treble damages, as well as potential prosecution by the Federal Trade Commission for alleged price discrimination. The *Wall Products* cases, as well as the earlier *Texas Gypsum* and *DiMarco* suits, all involved claims of price discrimination (Ev. H. DX-B 13, Ev. H. DX-D 13, Ev. H. DX-D 15, Ev. H. DX-G 2). The decisions in *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945), and *Viviano Macaroni Co. v. FTC*, 411 F. 2d 253 (3rd Cir. 1969), among others, amply justified defendants' occasional reliance on verification to ensure compliance with the price discrimination law. See *Belliston*

11. The prosecution admits that the *Gray* instruction on verification, which was tendered by defendants in this case, was "proper" because "the existence of an agreement and the purpose for the exchanges" was fairly submitted to the jury there (P. B. 263). Here, the issue of the purpose for the exchanges was taken away from the jury.

v. Texaco, Inc., supra, 455 F. 2d at 182; *Wall Products Co. v. National Gypsum Co., supra*, 326 F. Supp. at 313, n. 10.[12]

Price competition is fostered by an interpretation of the antitrust laws which permits selective price cutting without exposing the seller to the risk of civil and criminal liability under either the Robinson-Patman Act for discrimination or the Sherman Act for collusion. The prosecution short-sightedly ignores the consequences of its position when it urges that sellers concerned with granting a discriminatory price or becoming noncompetitive simply lower prices to *all* buyers in a market (P. B. 230). This "solution" is likely to increase the anti-competitive effect of the Robinson-Patman Act and heighten its conflict with the Sherman Act, as the Attorney General's National Committee to Study the Antitrust Laws has explicitly warned:

> "Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any anti-price discrimination law. For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, 'the right to meet a lower price which a competitor is offering to a customer,

12. The prosecution claims that in no case has a manufacturer relied upon verification exchanges to defeat claims of price discrimination (P. B. 257). In fact, *Belliston*, *Gray*, *Wall Products* and *Webster* all involved alleged violations of the Robinson-Patman Act as well as the Sherman Act. Such cases also flatly contradict the prosecution's assertion that after *Automatic Canteen Co. v. FTC*, 346 U. S. 61 (1953) it could not have been expected the Robinson-Patman Act would ever be construed to condone exchanges of competitive information (P. B. 258-59).

when this is done in good faith, is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act." *Report of the Attorney General's National Comm. to Study the Antitrust Laws*, 181 (1955) (Emphasis in the original).

As the *Wall Products* decision held, and the Ninth and Tenth Circuits have agreed, the "defendants' duty to establish good faith adherence to the dictates of the Robinson-Patman Act, constitutes a circumstance equally as compelling and controlling as that found in *Cement.*" *Wall Products Co. v. National Gypsum Co., supra,* 326 F. Supp. at 313. To so hold does not, as the prosecution suggests, immunize from Sherman Act scrutiny all agreements which are for the purpose of fixing, maintaining or stabilizing prices (P. B. 266). The cases are more limited in holding that good faith verification for Robinson-Patman compliance is a "controlling circumstance". This holding serves properly to extricate businessmen caught between two "antithetical" statutes which reflect "different and sometimes competing social values" (P. B. 228). Should verification be used as a pretext for price fixing, a fact finder may so determine under proper instructions. The vice below was that the jury was not permitted to consider that issue.[13]

To hold that good faith compliance with one law, in a manner precisely approved by federal courts and consistent with a half-century of Supreme Court teachings, subjects an individual to criminal penalties "would be man-

13. The prosecution argues that it presented additional evidence regarding verification which was not in the *Wall Products* record and might have persuaded Judge Zirpoli to reach a contrary result on the facts (P. B. 263-64). All this argument illustrates is the crucial need for careful, correct jury instructions when the evidence presents a fact issue as to the true purpose of verification.

ifestly unfair and unrealistic." *Wall Products Co. v. National Gypsum Co., supra,* 326 F. Supp. at 313.[14]

C. Substantial Evidence of Lawful Purposes Made the Failure to Give a Proper Charge Clearly Prejudicial. (J. B. I.C.2., I.C.3.; P. B. II.B.2., II.C.1., II.C.2)

The prosecution seeks to minimize the error of the trial court's charge on verification by contending that the evidence of defendants' lawful purposes was insufficient as a matter of law to create even a jury question in a criminal case (P. B. 18-28). Manifestly, the evidence of defendants' purpose to comply with the Robinson-Patman Act was substantial:

> "Each present or former official of the corporate appellants who testified regarding his direct or indirect participation (through the authorization of subordinates) in the market stabilization agreement stated that it was done to comply with the 'good faith' meeting competition defense of the Robinson-Patman Act" (P. B. 18).

Elsewhere, the prosecution acknowledges that twenty witnesses testified they engaged in verification exchanges for the purposes either of Robinson-Patman Act compliance or buyer fraud (P. B. 235, 251-53; See J. B. 38-41).[15]

14. To escape the clear error thus committed, the prosecution suggests that a timely objection was not made (P. B. 238-39, n. 255; 241, n. 258; 277). The source of the erroneous charge was a request submitted by the prosecution (4166a) to which the defendants filed written objections two days before such objections were due (3747a, Tr. 13,756-57; 3754a, Tr. 13,766; 3760a-3761a, Tr. 13,774-76; 3802a, Tr. 14,027). Correct instructions were submitted but either rejected or not given (3909a, Tr. 14,894; 3936a, Tr. 14,930). When the court's charge was completed, objections were invited and defendants specifically objected to permitting a finding of guilt based solely upon effect regardless of defendants' actual purpose (3930a-3931a, Tr. 14,923-24). The assertion of waiver is specious.

15. Moreover, even the prosecution introduced substantial documentary evidence showing the limited nature of defendants'

The only way to disregard this evidence of lawful purpose is to do what the trial court improperly instructed the jury to do: to presume as a matter of law that defendants' purpose was unlawful without consideration of the actual evidence.

Additionally, the prosecution labors to distinguish the evidence that defendants' further purpose in verifying was to protect against customer fraud (J. B. 38-46) and to argue that the evidence does not fall within the *Cement* rule recognized in *Container* (P. B. 242-54). If anything, the occasional verification evidenced in this record and the abortive USG job price protection register were far less restrictive and less formal measures to protect against customer misrepresentations than those practices approved in *Cement*, where actual "policing" of deliveries occurred.[16]

13. (Cont'd.)
verification consistent with their lawful purposes. See, e.g., GX 42; 118ex, GX 43; GX 46-47, 50-51; 133ex, GX 63; GX 66, 77, 81, 91, 94; 155ex, GX 100; 158ex-159ex, GX 105; GX 106, 111, 134, 143, 146-47, 165, 168, 191, 262, 342, 701, 703, 708, 710-12, 714, 716-18, 721-22, 732, 734, 736, 742-44, 747-49, 754-55, 760, 764-65, 986, 990, 994, 998, 1000, 1009, 1017, 1215, 1344.

16. The prosecution's contention that defendants' purpose to protect themselves against buyer fraud is not analogous to the facts in *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588 (1925) (P. B. 243-54), is based on the proposition that a buyer's oral false claim of a better offer from a competing seller is "simply not fraud" (P. B. 243). Under established principles of common law, however, a buyer's written or oral misrepresentation as to prices offered or charged by a seller's competitor constitutes actionable fraud. *Smith, Kline & French Co. v. Smith*, 166 Pa. 563, 31 A. 343 (1895); *see also, Moline Plow Co. of Kansas City v. Carson*, 72 Fed. 387 (8th Cir. 1895); *Lear v. Bawden*, 73 Colo. 383, 223 P. 831 (1924); *Rimling v. Scherper*, 206 Wis. 532, 240 N. W. 139 (1932); *Stuart v. Lester*, 1 N. Y. S. 699 (1888). Defendants' conduct therefore clearly falls within *Cement's* holding that ". . . the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them . . . cannot be held to be an unlawful restraint upon commerce . . . ." 268 U. S. at 603-04. See *Wall Products Co. v. National Gypsum Co., supra* 326 F. Supp. at 315.

Cement Mfrs. Protective Ass'n v. United States, supra, 268 at 594-96. However, it was for the jury, not the prosecution, to decide whether defendants' evidence brought their verification within the *Cement* rule. The trial court's erroneous view of the Sherman Act led to an instruction which prevented the jury from considering defendants' evidence. "No court is required by the Sherman Act to foster 'competition' procured by fraud and misrepresentation, and the Sherman Act does not prohibit a defendant from protecting itself therefrom." *Wall Products Co. v. National Gypsum Co., supra*, 326 F. Supp. at 315.

The jury should have been permitted to consider whether the purpose for the exchanges was to fix prices, or whether the exchanges were for the purpose of complying with the Robinson-Patman Act or to protect against buyer fraud. Instead the trial court's erroneous instruction to disregard evidence of lawful purpose, in effect, directed the verdict against defendants on this contested factual issue. Thus, the trial court's error on the central issue of verification was intensely prejudicial and requires reversal.

II. The Evidence Is Insufficient, as a Matter of Law, to Prove the Conspiracy Charged in the Indictment. (J. B. II.; P. B. III.)

The Indictment charges a single nationwide conspiracy beginning in 1960 and continuing throughout the statutory period (44a). But, the prosecution must fail in its attempt to make it appear that the disparate events presented at trial were all part of the same continuing common scheme charged in the Indictment. There is insufficient evidence of any agreement concerning prices, terms or conditions of sale, or materials handling practices which did, in fact, exist after December 27, 1968 or which contemplated continuation after that date; and, there is no proof of the requisite "connecting links" between the series of stale, separate and unrelated events relied upon by the prosecution. *United States v. DeCavalcante*, 440 F. 2d 1264, 1273-75 (3rd Cir. 1971) and see J. B. 66-68, 98-102.

A. The Sporadic Episodes Emphasized By the Prosecution Raise No Inference of the Conspiracy Charged Because They Are Not Connected and Are Frequently Inconsistent. (J. B. II.C.; P. B. I.B.1.)

The prosecution's pricing allegations primarily pertain to three 1965 price changes and a May 1969 attempt to raise prices (P. B. 67-96, 113-16). These events are separated by a 1967 nationwide price decrease and heavy discounting in 1968 (J. B. 13-14, 93-94).

The allegations regarding predatory conduct also lack any continuity or consistency. The prosecution claims that beginning in 1961 defendants conspired to cut prices to destroy Texas Gypsum (P. B. 153-63). Next, in 1964, Simpson of Republic was allegedly initiated into a conspiracy having as one of its objectives the destruction of his own company (P. B. 165). The prosecution alleges a wholly inconsistent conspiracy in 1965 to increase prices and ignore the competition of single plant producers (P. B. 91-93). Four years later there is a claimed 1969 conspiracy to increase prices nationwide (P. B. 113-16) and simultaneously to cut prices to destroy Republic (P. B. 166-73).

The prosecution's theory regarding verification and the Gypsum Association as "connecting" elements reveals additional inconsistencies. Watt's Association presidency is deemed sufficient to connect him to materials handling discussions unknown to him (P. B. 196). American Gypsum's Association membership and occasional verification are deemed sufficient to "connect" Hardin and Quayle to a conspiracy for hearsay purposes (P. B. 284-85). Yet, Simpson's rise to the Association presidency during the alleged 1968-70 predatory attack on his own company, and his participation in verification are completely ignored (GX 2480-82). The Gypsum Association and verification somehow make Watt, Hardin, and Quayle co-conspirators, but not Simpson.

Most strikingly inconsistent with the notion of a continuing conspiracy is the 1968-70 price war. In the first year of the statutory period prices fell more than 10% (J. B. 14). Despite severe inflation, 1970 prices were at historic lows: 20% below the pre-statutory 1968 level and 30% below prices 10 years earlier (*Id.*). Low prices existed everywhere, not just in the Southwest (see *infra* at 22-25).

The prosecution's recitation of claimed conspiratorial episodes does not support a reasonable inference of the charged conspiracy. The alleged episodes show no continuity in time, place, subject matter, or participants, and contain major inconsistencies. Contrary to the prosecu-

tion's claim (P. B. 66-67; 184, n. 201), verification provides no "connection" among these various episodes. The statutory period evidence regarding verification demonstrates that there was no agreement to verify, and the infrequent verification which did occur did not stabilize prices.

B. There Was No Agreement to Verify Among Defendants After 1968 and the Limited Verification in the Statutory Period Did Not Have Any Stabilizing Effect on Prices. (J. B. I.B.; P. B. III.A.)

The prosecution failed to prove that there was any agreement to exchange competitive information after 1968, because each defendant pursued a different policy regarding verification in the statutory period (J. B. 42-48). Moreover, the infrequent verification which did occur after 1968 had no stabilizing effect on prices.

USG ceased verification in mid-1968 (J. B. 42-43); National stopped verifying in early 1969 immediately upon learning of the *Container* decision, with three limited and unauthorized exceptions (J. B. 43-44); G-P had minimal verification contacts with smaller producers after 1968, none with USG or National (J. B. at 44-45); and Celotex continued limited verification consistent with advice of counsel (J. B. 45-46). The prosecution's effort to refute these facts is not supported by the record.

The prosecution claims that USG verified through 1973, citing testimony of Simpson of Republic, M. Meyer of Bestwall, A. L. Meyer of G-P, Van Cleve of Texas Gypsum, Jarrett and Thompson of Celotex, and Duffy of USG (P. B. 33-34). The prosecution contends that Simpson testified that he exchanged prices with Watt from 1964 to the " '69-'70 period (869a-870a)" (P. B. at 33). However, the Simpson testimony cited by the prosecution (869a-870a, Tr. 2464-65) concerning the " '69-'70 period", did not deal with anyone's involvement in actual price exchanges,

but related to Simpson's recollection of an Association discussion of recent court cases dealing with price exchanges (see Watt Reply Brief). Moreover, at another point Simpson expressly testified that USG had stopped verification prior to the time that Montgomery assumed verification duties at Republic, which event occurred *in 1967* (678a, Tr. 1965; 856a, Tr. 2416; 861a-862a, Tr. 2423; see Watt B. 9-10). Thompson (retired house counsel of Celotex) testified that "two or three years prior to 1973" Miller of Celotex told him that USG had "quit" verification (3012a, Tr. 11,633). This testimony confirms the fact that USG did stop verification, and roughly establishes when Thompson learned of this fact from Miller. It does not establish when Miller, who died in 1974, learned this fact, or when USG stopped verification.[17]

The prosecution's sole evidence of USG verification in the statutory period is that on *one* occasion in 1971 a USG credit employee responded to a verification inquiry (1102ex-1104ex, GX1009; see J. B. 43, n. 35).[18] Signifi-

17. M. Meyer's verification with USG occurred in the early 1960's at the latest (914a-915a, Tr. 2807-09). A. L. Meyer's testimony (1470a, Tr. 3511) and desk calendar (GX 448) prove that his verification with USG occurred prior to mid-1968 (See Watt B. 10). Although Van Cleve testified that Armstrong verified with Watt of USG at *some time*, Armstrong's statutory period verification occurred with an individual who did not work for USG (1844a-1845a, Tr. 6855-56). Likewise, Jarrett's testimony concerning his verification with USG does not establish that it occurred after 1968 (2012a-2013a, Tr. 7413; 2015a, Tr. 7416). Finally, Duffy merely testified about who had the "authority" to verify prices "from time to time" during the period 1960 to 1973 (3203a, Tr. 12,544). There was no testimony by Duffy, who never verified himself (3201a-3202a, Tr. 12,540-41), that anyone at USG verified during the statutory period.

18. The prosecution's brief also cites three other documents in support of its claim that USG continued verification (P. B. 33-34). There is no mention of USG in one of the cited documents (1103ex-1106ex, GX1010), and nothing in the other two documents suggests USG verification in the statutory period (1699ex-1703ex, GX2127; 1111ex-1115ex, GX1015).

cantly, this solitary departure from USG's otherwise adhered to policy of no verification (J. B. 42-43), was itself a classic example of lawful Robinson-Patman verification involving a fraudulent claim by one particular customer that it had been offered a competitive allowance.

Similar misrepresentations of the evidence are made by the prosecution concerning the claimed continuation of verification by other defendants. The testimony of Jarrett (2012a-2013a, Tr. 7413; 2015a, Tr. 7416) and Thompson (Tr. 11,634; see also, 3029a, Tr. 11,689) of Celotex, and an anonymously written and undated document (1111ex-1115ex, GX 1015) are cited against National, as well as USG, in the same misleading fashion. In addition, the prosecution cites a Celotex document (1699ex-1703ex, GX 2127; see P. B. 35) which makes no reference whatsoever to National. As for G-P, the prosecution erroneously asserts that A. L. Meyer of G-P continued verification at that company until his retirement in June 1969 (P. B. 35). In reality, A. L. Meyer denied any verification after February 1969, and could not recall any verification calls in 1969 (1478a-1480a, Tr. 5529-32). In summary, the evidence cited by the prosecution does not cast doubt on the critical fact that defendants pursued different policies regarding verification in the statutory period, including the policy of not verifying at all (J. B. 42-46).

An equally important refutation of the notion that verification supplied the connecting links of an alleged conspiracy which continued into the statutory period is that such verification was so infrequent that it could have had no stabilizing effect on prices. In fact, prices were chaotic during that period.

As pointed out in defendants' original brief, the hard statistical evidence of "rampant price competition" during the statutory period is overwhelming (J. B. 9-17). The

prosecution's only response to all of this economic evidence is that national price averages may be distorted by abnormally low prices in the Southwest (which the prosecution tries to explain away as predatory conduct), and that statistical data relating to the prices of the industry's leading product, ½" regular wallboard, provides no insight into the prices of low volume vinyl-covered wallboard (P. B. 175-76).[19] Both arguments are frivolous.

First, the prosecution's argument that defendants' evidence concerning price competition on ½" regular wallboard says nothing about prices on low volume vinyl wallboard (P. B. 176) is meaningless, because the prosecution never presented evidence that the price behavior of vinyl wallboard was any different except for one G-P price *announcement* dated April 1969 (see P. B. 176, n. 196). But within a few months, defendants were discounting vinyl wallboard by as much as five 5% discounts off list price in parts of the Midwest (G-P 656), and four 5% discounts off list in parts of the Southeast (G-P 655).

Second, there is abundant evidence that the 1968-70 price war was waged by defendants in all parts of the country against *each other*, and not merely in the Southwest against single plant producers.[20] Defendants' con-

19. The prosecution also makes the flimsy argument that for a few short months during the entire statutory period, average transaction prices rose slightly in but *one* marketing area throughout the entire country (P. B. 175-76). In addition, the prosecution totally fails to come to grips with the conclusion of defendants' economic expert, Dr. Richard Cyert, that the "rampant price competition" during the statutory period was entirely inconsistent with the claimed conspiracy (J. B. 13-17) and supplies no explanation for the failure of its own expert economist to dispute Dr. Cyert's data or his conclusion (see P. B. 177-80).

20. A major contributing factor to the 1968-70 price war was G-P's entry into the gypsum industry and subsequent utilization of its distribution centers, a revolutionary innovation (J. B. 11-13). G-P, not the single-plant producers, posed "the most serious long-range and broad threat" to the other defendants (1993ex-2006ex at 1996ex-1997ex, USG 328; J. B. 13).

temporaneous market reports reveal that as early as January 1968 prices were "highly competitive" in the Northeast (G-P 263), discounts existed in all major markets in USG's Central Division (USG 156), prices were "tumbling" in California (2276ex-2277ex, G-P 265), and price exceptions were found in the East Coast, West Coast, Southeast, and North Central areas (NG 31). By June 1968, competition was "hitting" with all the force it had in the Mid-Atlantic area (G-P 338), a new low hit parts of California (1972ex-1973ex, USG 159), and "prices of gypsum continued their downward spiral" and were chaotic throughout the country (NG 34; 2356ex, G-P 1114). From October to December 1968 prices changed from "day to day" in the Southeast (2283ex, G-P 314; G-P 350), deteriorated badly in the Lake Central Region (G-P 315), competitive pricing throughout the country continued with "intensity and varying detail" (USG 181), and an attempted price increase, which was "hotly competitive" in September (G-P 300), failed (2315ex-2316ex, G-P 411; 2256ex, G-P 219; 2257ex-2260ex, G-P 222; G-P 301; G-P 303; G-P 308; G-P 311; 1978ex-1982ex, USG 164, 165).

By January 1969, prices had continued to drop in the Lake Central Region (2321ex-2322ex, G-P 448), were "very unstable" in the Midwest (2341ex-2342ex, G-P 601), and on an average throughout the country slid another 1% from the December 1968 level (2172ex-2173ex, NG 404). In June 1969, prices were becoming "muddier everyday" and continued to erode in the Mid-Atlantic Region (G-P 626; G-P 637), were "still all over the board" and "demoraliz[ed]" in the Midwest (G-P 621; 620), and continued to "deteriorate at a rather rapid rate" throughout the country (NG 407). Between September and December 1969, it was reported that the "only one who has any confidence in pricing of gypsum (in California) is the buyer; he is confident it is not going up" (2344ex, G-P 738); the downward trend in the West continued (G-P 718; G-P 553), an attempted price increase in the East was first delayed by National and Celotex (G-P 519), and then postponed until January 1970 because of "vigorous competitive activity" (NG 424; G-P 542, 550); prices continued downward in the Lake Central area and broke down in the New York area (G-P 548, 556), and competition had a "new lower price practically every week" in the Southeast (2345ex, G-P 769).

Erratic pricing continued throughout 1970 as it had in 1968-69 with prices taking "another jolt" in Arizona and Colorado (G-P 576), continuing downward in the Mid-Atlantic, Northwest, Midwest and Mid-Central regions (G-P 578; G-P 867; G-P 584; G-P 587; 2340ex, G-P 588; G-P 591; G-P 593; G-P 594), "terrible" and "unsettled" in the Northeast and Northwest regions (G-P 1010; G-P 596; G-P 868; see also G-P 586), and "unstable" in the Southeast (G-P 1029; see also G-P 878; G-P 907). It was this price competition *throughout the country* which made the 1968-70 period a "price war" (2817a, Tr. 11,007; 2277a-2278a, Tr. 9298-9304), "very volatile" (2317a, Tr. 9482), a nationwide "blood bath" (Tr. 5373-74), "vicious and cut throat" (2871a, Tr. 11,174), and "intense" (2117a, Tr. 8617). (See also 2434ex-2455ex, CEL 27-32).

The prosecution's failure to prove any agreement to verify in the statutory period and its failure to prove that the extremely infrequent verification which did occur had any stabilizing effect on prices belie the existence of any "common thread" of verification connecting the various alleged conspiratorial episodes.

C. The Record Does Not Support the Prosecution's Claims That Specific Alleged Statutory Period "Episodes" Were Pursuant to Any Agreement. (J. B. II.; P. B. III.)

The prosecution's claims regarding events occurring within the statutory period focus on the May 1969 price change (P. B. 113-16), the 1971 elimination of wooden pallets in Michigan (P. B. 145-48), and the alleged predatory attack upon Republic Gypsum which culminated in 1970 (P. B. 166-73). Also, the prosecution alleges that the "effects" of an allegedly conspiratorial 1966 credit terms change "continued" into the statutory period (P. B. 134-38). None of these episodes were conspiratorial in themselves, nor can they be connected to any continuing conspiracy.

1. *The May 1969 List Price Change.*

After discussing in detail the December 1965 price change and events immediately preceding that change (P. B. at 66-96), the prosecution devotes a mere three pages to the May 1969 price increase--the *only* list price change in the statutory period claimed to be conspiratorial (P. B. at 113-16). Apart from quibbling about the wording of three internal G-P memoranda which are fully discussed in defendants' original brief (J. B. 71-79),[21] the prosecution asserts that nearly three months before the initial public announcement (1179ex-1181ex, GX 1151-1153) "Morgan (USG) talked to Hunt (G-P) . . . [and] reassured him that USG would lead a price increase in the near future" (P. B. 113). In support of this statement the prosecution merely cites two pages from Hunt's desk calendar which show nothing more than that Hunt may

21. All of the three G-P memoranda were written *after* USG's trade announcement on January 31, 1969 and related to information picked up in the field (See J. B. at 73-77).

have telephoned Morgan in November 1968 (540ex-542ex, GX 456a-456b), and a document (1190ex-1191ex, GX 1163) which makes no mention of any Morgan-Hunt conversation, and which was written by McCaskill, a G-P employee, who didn't even know that any conversation might have taken place[22] (1299a-1300a, Tr. 4477-79; 1302a, Tr. 4481; see J. B. 75-76). During trial, defendants presented unchallenged evidence concerning the legitimate business purpose which would have motivated the Hunt-Morgan telephone conversation, assuming Hunt's calls were actually completed (J. B. 74-75). Even in the absence of this evidence, any Hunt-Morgan contact would be presumptively lawful and wholly insufficient to infer the conspiratorial conduct claimed by the prosecution. *United States v. Van de Carr*, 343 F. Supp. 993, 1001 (C. D. Cal. 1972). See *Venzie Corp. v. U. S. Mineral Products Co.*, 521 F. 2d 1309, 1312-16 (3rd Cir. 1975); *United States v. Basurto*, 497 F. 2d 781, 793 (9th Cir. 1974).

The unsupported accusation of a conspiratorial purpose for the alleged Hunt-Morgan telephone conversation exemplifies the prosecution's approach to so-called "opportunity contacts": any and all contacts by anyone at any time are merely presumed to be unlawful. The prosecution states a conspiratorial purpose as proven fact when it is really only unsupported speculation. Although the prosecution makes a great many statements about the alleged subject matter of various meetings which have occurred

22. The prosecution also claims that "Hunt then relayed the information [that he had received from Morgan of USG] to McCaskill who begain preparing for a price increase" (P. B. 113-114). The document cited by the prosecution (1813ex-1814ex, GX3003) as well as other contemporaneous documents (2249ex-2260ex, G-P 215-217, 219, 222), dispel any notion that McCaskill obtained any advance notice of and was preparing for USG's price announcement. In fact, McCaskill was *not* preparing for an increase by USG but instead was seeking suggestions from G-P's regional managers for a proposed price change to be announced by G-P.

since 1960, an inspection of the record citations given in support of these statements invariably discloses nothing more than the mere fact of the meetings (except in those instances when the lawful business reasons for the meetings are also indicated).

2. *The 1971 Elimination of Wooden Pallets in Michigan.*

The 1971 decisions to stop shipping gypsum wallboard on wooden pallets in Michigan is the only materials handling matter during the statutory period which is challenged by the prosecution. As is apparent from the prosecution's brief, there is *no* evidence that these decisions had any effect upon prices, and thus they can provide no basis for sustaining these convictions. *State of Arizona v. Cook Paint & Varnish Co.*, 1973-2 Trade Cases, CCH Trade Reg. Rep. ¶ 60,450 at 67,014-15 (D. Ariz. 1973).[23]

Furthermore, the prosecution's allegations of unlawful agreement regarding Michigan pallets is once again based upon unwarranted characterizations of the evidence. The prosecution refers to a telephone call made by a USG local plant manager claiming that he informed a Celotex local plant manager of National's decision to withdraw pallets (P. B. at 148). However, the testimony and contemporaneous documentation of this telephone call prove that National's decision was not discussed (1807a, Tr. 6702; 1584ex, GX 1774). Moreover, prior to the telephone call, National had already notified its field sales

23. The prosecution does not dispute the evidence showing that prices were unaffected by the elimination of pallets (see J. B. 82, n. 73). In support of an argument that "costs" of materials handling practices were "related directly to prices" (P. B. 144, n. 150), the prosecution refers to four record citations, none of which show that the cost of any materials handling practice had any effect upon defendants' list or market prices at any time, much less during the chaotic pricing situation that existed immediately prior to and throughout the statutory period.

personnel of its decision (GX 1772), so that they could notify the trade.[24]

The real thrust of the prosecution's argument is that the 1971 elimination of pallets in Michigan is "suspicious" because of a discussion held at a 1966 Association committee meeting. But nothing ever resulted from this discussion because its participants sought and thereafter followed the advice of legal counsel to drop the matter (J. B. 95-96).[25] It is ironic that the prosecution *throughout its brief* sets forth as "incriminating evidence" the fact that defendants' employees sought and then followed legal advice (see, e.g., P. B. 40, n. 36; 55-56; 61-66; 81, n. 89 and 94; 197-200). The goal of antitrust law compliance is not well served by thus discouraging the obtaining of legal advice.

3. *Republic Gypsum.*

The prosecution's entire discussion of defendants' alleged predatory conduct directed at Republic Gypsum (P. B. 163-73) is an elaborate attempt to obscure the inescapable fact that there is no evidence of agreement or even communication among defendants regarding any effort to drive Republic out of business. Simpson of Republic, the prosecution's key witness on this matter, was on the stand for four days and yet gave no testimony from which any inference of any such alleged agreement could be drawn.

24. The prosecution also claims that Celotex got Flintkote "in line" on pallets (P. B. 148). However, Flintkote was not a manufacturer of wallboard sold in Michigan, but rather purchased its wallboard from Celotex (see P. B. 147, n. 133; 1803a-1804a, Tr. 6687-88). The fact that Celotex informed Flintkote along with its other customers of its own decision to stop using pallets is not probative of any conspiracy.

25. The prosecution cites a series of documents showing that "something" having to do with "pallets" was discussed at subsequent Association committee meetings (P. B. 147, n. 134). An examination of these documents shows that a *continued use* of pallets in Michigan, not their elimination, is implicit in such discussions.

The prosecution's argument regarding Republic boils down to the fact that for two fiscal years of its operation that company did not earn a profit (1879ex, USG 72; 799a-802a, Tr. 2226-29). Simpson himself conceded that demand for wallboard at that time, as measured by housing starts, was severely depressed and that defendants' profits dropped as well (851a-853a, Tr. 2406-08; see also J. B. 82-83). In 1970, low demand caused sharply reduced sales volumes for all defendants (50ex; GX 7, Schedule C), and forced down industry prices to historic lows (see J. B. 14). The fierce 1968-70 price war was *not* merely confined to the Southwest where Republic marketed (see *supra* at 22-25).[26] In the middle of this price war engendered by depressed demand, Republic Gypsum announced a 40% price increase (P. B. 170) which was followed only by Celotex, an alleged predator (1486ex, GX 1589). It is the other defendants' failure to follow this economically absurd price move which the prosecution labels as "conspiratorial."[27] Contrary to the prosecution's assertion (P. B. 170),

26. The prosecution creates a false impression of price activity during 1968-69 by confusing list prices with market prices and by ignoring the chaotic condition of prices in areas other than the Southwest. The prosecution argues that in October, 1967 the "list" price in Dallas was $45.75, that by November, 1968 the "market" price there had fallen to $37.13, and that prices outside that area were significantly higher (P. B. 168). But, for example, "list" prices in California in October, 1967 were $47 and $49 (GX3219a-3220), while the "market" price in that same area in December, 1968 was $34 (G-P 1423; G-P 1455).

27. The prosecution's argument (P. B. 172-73) that defendants "bankrolled" predatory price cutting with "substantial profits" on higher priced specialty products not produced by the single plant producers, such as water resistant board and vinyl board, is frankly ridiculous. First, Republic manufactured water resistant board (1484ex-1485ex, GX1588), and other single plant producers sold vinyl board (e.g., G-P 929, p. 3). Second, no defendant could underwrite alleged predatory price cutting with sales of these products because they constituted such a small proportion of the product mix. For example, vinyl board constituted only 3.4% and water resistant board only 1.2% of National's gross sales on all gypsum board machine products in 1969 (GX3081-3082).

extensive competitive job protection in the market ensured that any announced price increase would not become a reality (G-P 890-91, 893-94), prevented two producers from raising prices (G-P 916, 964), and necessitated a price decrease a few months later (1499ex-1503ex, GX 1596).

The prosecution's arguments regarding Republic Gypsum exemplify the unsupported assertions of "agreement" *and* the inconsistent theories set forth throughout the prosecution's brief. Increasing prices is allegedly conspiratorial (P. B. 78-97; 113-16). Not increasing prices is allegedly conspiratorial (P. B. 170). Meeting the competition of single plant producers is allegedly conspiratorial (P. B. 153-73). Not meeting the competition of single plant producers is allegedly conspiratorial (P. B. 91-92). In reality, however, all of this alleged conspiratorial conduct is at most nothing more than an expected response to common economic conditions.

4. *The Alleged Continuation of 1966 Credit Terms.*

In addition to the preceding three statutory period "episodes", the prosecution also argues that the alleged conspiratorial 1966 credit terms—"2% 20th prox. net 10th 2nd prox."—continued into the statutory period (P. B. 134-35). This argument is misleading. First, the amount of the cash discount available for prompt payment, 2%, was not something established by the March 1966 credit terms change, but rather had been in existence long before that time (2069ex, USG 605).[28] Second, the time period to earn the 2% cash discount, "20th prox.", and the time to pay the net, "10th 2nd prox.", which were new features of the March 1966 credit terms change, were more favorable to

28. The prosecution does not claim that the origins of the 2% discount were conspiratorial.

the customer than the pre-existing credit terms (2069ex, USG 605). It is thus not surprising that those features remained in effect during the fiercely competitive statutory period. The critical fact, not disputed by the prosecution, is that the only two features of the March 1966 credit terms change *unfavorable* to customers were no longer in effect by the beginning of the statutory period (see J. B. 94). Indeed, the prosecution dwells at length on the significance of the withdrawal of extended terms in March 1966, and the adverse consequences to customers resulting therefrom (P. B. at 120-32), but ignores that by early 1968, at the latest, defendants were again granting extended terms to customers (J. B. 94).[29]

D. The Prosecution Cannot Remedy the Absence of Evidence of Conspiracy by Prejudically Referring to Matters Dehors the Record and by Claiming Concealment.

The prosecution's brief repeatedly makes improper—and frequently utterly false—references to matters *dehors* the record. Such behavior merely demonstrates the prosecution's own awareness that these convictions cannot be sustained upon the evidence in the record and, furthermore, exemplifies the improper appeals to prejudicial matter outside the record which constituted a principal category of prosecutorial misconduct during the trial (see J. B. 156-58).

29. Moreover, G-P never used the "2% 20th prox. net 10th 2d prox." March 1966 credit terms for branch warehouse sales (1982a-1984a, Tr. 7320-22; 2825a-2826a, Tr. 11,017-18) through which up to 90% of its total gypsum sales were made by the beginning of the statutory period (2866a-2867a, Tr. 11,168). The prosecution's arguments (P. B. 135-38) concerning the extension and withdrawal of the "3% prompt payment discount" are fully addressed in defendants' original brief at pp. 79-80, 96-97.

Thus, unable to establish the truth of alleged "facts" with citations to the record, the prosecution's brief instead cites testimony given in other cases by parties not before this Court (P. B. 16, n. 14; 85, n. 93; 90-91, n. 98). In an effort to prejudice defendants before this Court, the prosecution makes irrelevant and frequently inaccurate references to the reasons for or legal consequences of final judgments in other cases (P. B. 26, n. 20; 38, n. 34; 52, n. 54; 56, n. 57; 197-98, n. 215; 211, n. 228; 227, n. 245; 329, n. 336). Similarly, the prosecution falsely represents that some originally named defendants in this case admitted "price fixing" (P. B. 4, n. 4), and points to the irrelevant facts that some witnesses exercised constitutional rights at trial and before the grand jury (P. B. 5, n. 5).

The prosecution also attempts to excuse the absence of evidence of conspiracy in this case by falsely asserting that some defendants attempted to conceal evidence in other cases (P. B. at 18, n. 16; 52, n. 54; 85, n. 93) and by arguing that defendants "concealed" or "kept secret" their verification practices (e.g., P. B. 47-61). The short answer to any alleged "concealment" of verification is that the Antitrust Division knew that USG and National described their verification in publicly filed documents in 1965 (see Ev. H. DX D-4-6; J. B. 63). Therefore, nothing in the record—or outside of it—justifies sustaining these convictions. There is no substantial evidence that defendants participated in a continuing, nationwide price-fixing conspiracy as charged in the Indictment. The convictions should be reversed, and acquittals mandated.

III. Defendants Were Severely Prejudiced by the Trial Court's Repeated Errors and Its Partiality Toward the Prosecution.

A. Dismissal of the Indictment Is Required Because the Defendants Were Severely Prejudiced by the Prosecution's Excessive Pre-Indictment Delay (J. B. III.B.; P. B. III.C.).

Abandoning the position which it successfully urged on the court below, the prosecution now accurately states that the Indictment must be dismissed if unreasonable pre-indictment delay caused substantial prejudice (P. B. 324). Therefore, the trial judge applied the wrong legal standard when denying defendants' motions to dismiss. Because defendants did suffer severe prejudice from unreasonable delay, dismissal is required.

1. The Prosecution Unduly Delayed Commencing This Prosecution (J. B. III.B.1; P. B. III.C.1).

The prosecution has defined the essence of the alleged conspiracy as an agreement to verify (P. B. 15). But Judge Zirpoli held (USG B. 26-29),[30] and the evidentiary hearing confirmed, that the prosecution has had *actual knowledge* of defendants' verification, as well as the evidence concerning the 1965-66 pricing and credit announce-

30. The prosecution cannot escape the binding effect of Judge Zirpoli's express *finding of fact* by arguing that the *legal* issue before Judge Zirpoli was different (P. B. 330). Moreover, even if Judge Zirpoli had merely found that the prosecution *should have known* of the relevant facts (in fact, he found that the prosecution *did know*), such prosecutorial negligence would still require the dismissal of the Indictment in light of the severe prejudice caused by the delay. *United States v. Barket*, 530 F. 2d 189, 195 (8th Cir. 1976).

ments, since at least January 1, 1968.[31] Over the years, this actual knowledge resulted in six grand jury recommendations and a 1969 request that prosecution commence without a grand jury "in view of the delay" (J. B. 115-19). Yet even after 1969, the prosecution admittedly deliberately postponed impaneling a grand jury for more than two years to await the outcome of civil litigation (J. B. 118; Ev. H. DX Q-28).

The prosecution's only explanation for this delay is that certain aspects of its investigation were "closed, not deferred or postponed" (P. B. 325). But administrative characterizations of "the referral, declination or closing of [a] case" are irrelevant to the issue of pre-indictment delay. *See United States v. Barket*, 530 F. 2d 189, 192, 195 (8th Cir. 1976). The pertinent fact is that defendants' conduct challenged in this case was known to the prosecution years before the grand jury was impaneled (J. B. at 115-18). Because the prosecution points to nothing of substance added to its case during the delay,[32] the argument that "there is an important public interest in not requiring

31. The extreme degree to which this case is in essence a replay of *Wall Products* is exemplified by the prosecution's wholly improper citation to testimony given in that case to sustain these convictions (P. B. 16, n. 14; P. B. 85, n. 93; P. B. 90-91, n. 98).

32. The prosecution asserts that the uncovering of "three new factors" explains why the grand jury investigation did not begin until August 1971 (P. B. 328). Two of the "factors" were not "new" at all. Thus, allegations of predatory conduct were first made to the government in 1961 (143a-144a, Ev. H. 723-24), and were a principal reason for the first grand jury recommendation in 1965 (Ev. H. DX Q-6). Similarly, the evidence which led to the *Wall Products* decision was detailed for the prosecution in pretrial briefs it examined (Ev. H. DX G-9), and was the basis for a 1969 grand jury recommendation (Ev. H. DX Q-18; Ev. H. DX Q-19; Ev. H. DX Q-19A). Moreover, even after the *Wall Products* decision, the prosecution delayed return of the Indictment over two and one half more years and thus allowed the statute of limitations to run on the only violation of law found by Judge Zirpoli. The third "new factor" was two 1971 price increases, neither one of which are even claimed to be conspiratorial.

the prosecutor to act too soon" (P. B. 325, 331) is inapplicable here. This is particularly true considering that the heart of this case is an express attack on the *Wall Products* decision which the prosecution claims it waited to obtain (compare P. B. 243, n. 260 with P. B. 327). Clearly, the prosecution unreasonably delayed this prosecution.

2. Defendants Suffered Actual Prejudice as a Consequence of the Prosecution's Pre-Indictment Delay (J. B. III.B.2; P. B. III.C.2).

The true magnitude of the unreasonable pre-indictment delay is illustrated by the 145 pages devoted to events occurring prior to the statutory period in the prosecution's 165-page description of the alleged conspiracy. The true magnitude of the resulting prejudice is illustrated by the 114 witnesses with direct knowledge of these events who died, resigned, or retired while the delay continued (J. B. 138-43).

Contrary to the prosecution's suggestion (P. B. 332-33), defendants need not particularize this prejudice by stating in detail what exculpatory facts might have been established by each lost witness. Because it is undisputed that these individuals had direct knowledge, "the Government must bear the burden of demonstrating that the missing witnesses did not possess exculpatory evidence." *United States v. Barket, supra,* 530 F. 2d at 196. This principle has particular force here, because the prosecutor so heavily relies upon unsupported *inferences* from lawful conduct, including alleged conspiratorial "opportunity contacts", by persons whose death deprived defendants of direct refutations of those "inferences" (J. B. 119-21). If one deleted from the prosecution's brief merely those arguments relating to the ten dead witnesses expressly referred to more than one hundred times in the prosecutor's closing argument (J. B. 119), the resulting evidentiary void would be glaring.

For example, the 1974 death of Miller (Celotex) (J. B. 139), who vigorously denied unlawful conduct before the grand jury (157a-159a, Ev. H. 808-812), prevented effective refutation of the prosecution's repeated inferences concerning his limited verification in the statutory period (e.g., P. B. 32-36). The prosecution shrugs off this loss with the empty assertion that Miller's testimony could have been replaced by the testimony of his superior, Greenwood (P. B. 332), *who retired in early 1969* (J. B. 141) and who obviously knows nothing of Miller's subsequent conduct.[33] Similarly, the 1974 death of Quayle (American Gypsum) (J. B. 139) deprived defendants of an express denial of critical testimony by a key prosecution witness that Quayle was a conspiratorial emissary of defendants (J. B. 120). This loss was not fairly remedied, as the prosecution urges (P. B. 332), by the partial reading (over the objection of three defendants) of a cold grand jury transcript poisoned by one-sided questioning and lacking cross-examination.

It is precisely such delay-caused prejudice, erroneously disregarded as "moot" by the trial judge (62a), which violates due process and requires the dismissal of the Indictment. *United States v. Barket, supra,* 530 F. 2d at 193.

B. The Trial Court Prejudicially Refused to Give a Proper Final Charge on Key Conspiracy Law Principles (J. B. I.C.4, III.A.; P. B. II.D.2, III.B.).

Pre-indictment delay caused a "problem of limitations" and thus made "critical" a *Borelli* instruction regarding the scope of each defendant's alleged agreement, (*see*

33. Moreover, the prosecution has asserted Miller's participation in alleged conspiratorial meetings with a hostile prosecution witness and with others now also deceased (J. B. 120-21, incl. n. 103). Greenwood did not attend these meetings.

United States v. Borelli, 336 F. 2d 376, 385-86 (2nd Cir. 1964), *cert. denied*, 379 U. S. 960 (1965)), and a proper "withdrawal and abandonment" instruction. Even apart from the limitations question, the fragmented nature of the prosecution's case, consisting of many different "episodes" occurring at many different times and involving many different people and subjects, necessitated both a *Borelli* instruction and a *Kotteakos* instruction on single versus multiple conspiracies. *See United States v. Bertolotti*, 529 F. 2d 149 (2nd Cir. 1975). In addition, a proper instruction on "legal advice" was necessary to focus the jury's attention upon whether there was a conscious commitment to a common scheme.

Kotteakos. The prosecution does not dispute that a *Kotteakos* instruction was appropriate in this case, nor that the charge tendered by defendants was correct.[34] Instead, the prosecution claims, without citing authority, that the trial judge fulfilled his prior express commitment to give defendants' *Kotteakos* instruction (see J. B. 104-05, n. 91), by merely informing the jury that the prosecution had the burden of proving the offense charged, and by twice incorporating into the body of the instructions passing references to a "single design" and a "common plan" (P. B. 314). However, it is obvious that such language falls far short of explaining to the jury the difference between a single conspiracy and multiple conspiracies, and the legal consequences of this difference. *See United States v. Borelli, supra*, 336 F. 2d at 382-83,

34. The prosecution does argue, however, that the failure to give a *Kotteakos* instruction is not plain error, and cites in support *United States v. Vicars*, 467 F. 2d 452 (5th Cir. 1972), *cert. denied* 410 U. S. 967 (1973), which held that no plain error is committed by not giving a *Kotteakos* instruction when the evidence *clearly* shows the existence of but one conspiracy *and* the defendant neither requested such an instruction nor objected to the failure to give it. This argument is irrelevant in this case.

n. 1; *United States v. Johns-Manville Corp.*, Cr. 21-118 (E. D. Pa. 1962), *ABA Jury Instructions in Criminal Antitrust Cases*, 482 at 512-14 (1965).

The prosecution's principal argument is that defendants "waived" the failure to give a *Kotteakos* instruction by not objecting after the charge (P. B. 314-15). But the prosecution is flatly wrong. On three occasions following the charge, defense counsel objected to the court's failure to give instructions which they had previously tendered, including the *Kotteakos* instruction, and expressed their willingness to once again make a record by particularizing each denied or omitted request (3909a, Tr. 14,894; 3923a, Tr. 14,913; 3936a, Tr. 14,930). The trial judge expressly acknowledged his understanding that the objection "relates to all charges which I did not give which people asked me to give" (3923a, Tr. 14,912-13), and that "Anything I turn down, it is on the record by Mr. DeLone's objection" (3936a, Tr. 14,930). The trial judge did not want further specificity so as "not [to] waste time" (3923a, Tr. 14,913) and, in fact, testily quipped that he "really [didn't] understand why" defense counsel continued to press the objection (3936a, Tr. 14,930). The purpose of F. R. Cr. P. 30's requirement that specific objections be made before the jury retires is to inform the trial court of the nature and grounds for the objection. When the trial judge himself states that he is aware of the objection and wants no further particularization, there is no "waiver". *See* Baron, *Federal Practice and Procedure*, Vol. 4, ¶ 2235 at pp. 250-51; *American National Bank & Trust Co. v. Aetna Insurance Co.*, 447 F. 2d 680, 683 (7th Cir. 1971); *Green v. Reading Co.*, 183 F. 2d 716, 719 (3rd Cir. 1950).

Borelli. The prosecution does not dispute that a *Borelli* "scope and purpose" instruction was required in this case, nor that the charge tendered by defendants was

correct. However, again pointing to isolated fragments sprinkled about the charge, such as the instruction to determine each defendant's guilt or innocence separately, the prosecution asserts that the jury received an adequate "scope and purpose" instruction (P. B. 316-17). The *Borelli* court noted that in conspiracy cases a trial "court *always* charges" in this manner, but that this is insufficient to focus the jury on the question of the scope of each defendant's agreement. 336 F. 2d 385-86, including n. 4.[35] Even collectively considering the fragments set forth by the prosecution, the jury was never told that a defendant cannot be held responsible for what another conspirator did beyond the reasonable intendment of the common agreement as that defendant understood it to be.[36]

The prosecution also again resorts to a claim of "waiver". In addition to the false claim that defendants did not object after the charge (discussed above), the prosecution finds "waiver" in the fact that defendants tendered the *Borelli* instruction with their Supplemental Requests (P. B. 316). This claim is frivolous. To begin with, defendants' original requests fairly comprehended a *Borelli* instruction (4079a-4081a, Def. Req. Final Inst. 7; 4081a-4082a, Def. Req. Final Inst. 8; 4104a-4105a, Def. Req. Final Inst. 40; 4109a-4111a, Def. Req. Final Inst. 46). Furthermore, the circumstances leading to the filing of the Supplemental Requests does not show "waiver", but merely

35. The *Borelli* court reversed a conviction for the failure to give such a precise focusing instruction even though the trial court in that case had gone much further than the trial court here by giving a full *Kotteakos* instruction. 336 F. 2d at 382-83, n. 1.

36. Thus, under the instructions given, the jury was told to convict a defendant if, for example, it found that the defendant participated in what it understood to be an unlawful agreement limited to one specific pre-statutory period price increase and, subsequently, other parties to that agreement conspired to attain another price increase in the statutory period without the commitment of the defendant.

defense counsel's efforts to overcome the trial court's partiality toward the prosecution at a critical stage of the trial.

At the June 27 hearing on instructions,[37] the trial court denied as stated all of defendants' original requests because they contained references to the evidence (3747a, Tr. 13,737),[38] and ordered that any objections to the instructions as he outlined them, together with any additional requests, should be submitted in writing by July 2 (3754a-3755a, Tr. 13,766-67; 3761a-3762a, Tr. 13,776). On the afternoon of June 30, the judge moved up the deadline to the following morning (Tr. 13,899). Although defendants then complied with that earlier deadline, the trial judge nevertheless announced that he would not even consider defendants' Supplemental Requests because they were "out of date" (3783a, Tr. 14,001-02). Frankly surprised by this inexplicable ruling,[39] and in an effort to persuade the trial

37. As soon as was possible after the June 27 hearing (on the very same day), defendants filed a Rule 30 motion seeking further clarification of the trial court's rulings on the requests for instruction. Although the prosecution now reiterates the trial judge's claim of "ambush" concerning this motion (3801a-3802a, Tr. 14,026), the motion was required by the trial court's "grossly uninformative" rulings on June 27: e.g., "denied to the extent that I do not give it in substance", "given in the main in substance and denied to the extent that it is not." *See* 8 *Moore's Federal Practice*, 2d Ed. ¶ 30.03[2], p. 30-7. The trial court's obvious hostility toward the motion (Tr. 13,790; Tr. 13,899; 3801a-3802a, Tr. 14,026), effectively foreclosed defense counsel from requesting further clarification at the July 1 hearing. But none of the statements by defense counsel in closing arguments (see P. B. 312) constituted "waiver" of Rule 30 when the trial judge *subsequently* refused to give promised instructions and inserted new instructions into the final charge.

38. This reason for denying defendants' original requests proved ironic, because the final charge ultimately did contain the same type of evidentiary "comment" contained in defendants' requests—except that such "comment" was invariably favorable to the prosecution (3863a, Tr. 14,533; 3867a-3869a, Tr. 14,535-38; 3871a, Tr. 14,542; 3887a-3888a, Tr. 14,562-63; 3908a, Tr. 14,592).

39. The prosecution does not even attempt to explain this ruling. Nor is there any explanation why *six days later* the trial

judge to at least look at the Supplemental Requests, one defense counsel did make the basically correct statement that these requests were written to delete from defendants' original requests what the trial judge had considered objectionable references to the evidence (3783a, Tr. 14,001-02). But it is not true, as the prosecution represents (P. B. 316), that the trial court ignored the Supplemental Requests because of this statement. To the contrary, the trial judge had already refused to consider the Supplemental Requests before the statement was made (3783a, Tr. 14,001).

Abandonment and Withdrawal. The prosecution does not dispute that when considering an alleged price-fixing conspiracy, the resumption of competitive pricing behavior constitutes a "communication of . . . abandonment in a manner reasonably calculated to reach co-conspirators" (P. B. 318). Similarly, when considering an alleged "verification conspiracy" (P. B. 15), the extensive evidence that defendants USG and Watt stopped verification prior to the statutory period and National stopped in January 1969 is surely relevant to the abandonment and withdrawal issue. Yet, despite the prosecution's lengthy argument (P. B. 317-20), the plain fact is that the jury was not permitted to consider any of this evidence because it was expressly instructed that: "To withdraw, a defendant . . . must have *affirmatively notified each other member* of the conspiracy . . ." (3898a, Tr. 14,877). No authority cited by the prosecution requires such affirmative notification of every co-conspirator, and so charging the jury was "virtually a directed verdict" against defendants on this issue since many alleged co-conspirators were unknown to each other.

39. (Cont'd.)
court agreed to give the substance of a supplemental charge on the critical verification issue submitted by the prosecution (Tr. 14,368).

See NBO Industries Treadway Companies, Inc. v. Brunswick Corp., 1975–2 CCH Trade Cases, ¶ 60,479 (3rd Cir. 1975).

In arguing that the trial court's charge on abandonment embraces defendants' theory (P. B. 317), the prosecution ignores the limiting impact of the language which defendants' assign as error (J. B. 109). In the context of the court's generalized abandonment instruction, to tell the jury that in order to withdraw "a defendant *either* must have affirmatively notified each other member of the conspiracy he will no longer participate . . . *or* he must make disclosures of the illegal scheme to law enforcement officials" (3898a, Tr. 14,876-77) (emphasis added) is to tell them they can consider only those two events.[40]

Moreover, telling the jury it could consider resumption of competitive behavior as evidence of affirmative action to withdraw from a conspiracy (4094a, Def. Req. Final Inst. 25) would not have required "extended comment on the evidence" as the prosecution argues (P. B. 317-18). Simply making the statement would suffice to permit consideration of that evidence by the jury and would have been consistent with permitting counsel to argue that evidence.

Legal Advice. The prosecution's argument that legal advice "has no bearing" on the question of agreement because a "conscious commitment" is not "a necessary

40. Since the trial court had included within its instruction two specific methods of withdrawal, the jury at the very least might have been confused to the extent that they did not take into account resumption of severe price cutting, and other substantial evidence of "rampant competition" during the statutory period. Confusing instructions are grounds for reversal even if legally correct (see USG B. 21-23). "A conviction ought not to rest on an equivocal direction to the jury on a basic issue", *Bollenbach v. United States*, 326 U. S. 607, 613 (1946). *See* also, *United States v. Silver*, 457 F. 2d 1217-19 (3rd Cir. 1972) and *Virgin Islands v. Carmona*, 422 F. 2d 95, 99 (3rd Cir. 1970).

element of 'agreement' under the Sherman Act" (P. B. 269-70, including n. 283) is so utterly without merit and support in the authorities as to require no reply. *See Klein v. American Luggage Works, Inc.*, 323 F. 2d 787, 791 (3rd Cir. 1963); *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963). Equally without merit is the prosecution's claim that defendants' requested legal advice instruction (4082a-4083a, Def. Req. Final Inst. 9; 4208a, Def. Supp. Req. 7) was an improperly limited comment on "only a small part of all the evidence" (P. B. 270-71). The fact is that the final instructions did contain extensive references to what evidence might show "agreement" (3879a, Tr. 14,852; 3883a, Tr. 14,857; 3887a-3888a, Tr. 14,862-63; 3896a-3897a, Tr. 14,874-76; 3899a-3900a, Tr. 14,879) and, moreover, included a reference to legal advice which rendered irrelevant defendants' evidence on this issue (3903a, Tr. 14,885). Therefore, submission of defendants' requested legal advice instruction would merely have balanced an otherwise one-sided charge.[41]

C. The Jury Verdict Was Contaminated by Consideration of Incompetent, Inflammatory Hearsay Evidence (J. B. III.C.; P. B. III.A.).

The prosecution's response to the trial court's repeated errors in improperly admitting prejudicial hearsay evidence merely sidesteps the issue. For example, with

41. The legal advice which defendants received on verification was relevant to a central theory of the defense and was demonstrated by substantial evidence. Under the authorities (see J. B. 51, n. 47), defendants were thus entitled to a specific legal advice instruction irrespective of whether other types and categories of evidence were also relevant to the crime charged. The fact that the prosecution was free to, and did, submit instructions on other categories of evidence is irrelevant to the issue of defendants' right to receive an instruction on one particularly crucial defense theory.

respect to the erroneous admission of GX 121 (173ex-178ex; see J. B. 127-28), the prosecution claims that "There is no dispute as to the authenticity of this exhibit," [42] and then mischaracterizes "Appellants' real complaint" as going "to relevancy rather than authenticity" (P. B. 281). This misses the point. GX 121 is *hearsay* which was erroneously admitted into evidence as a "business record" although no witness testified that it was made in the regular course of business or that it was the regular course of USG's business to make such a record. The admission of GX 121 was thus clear error to which the prosecution has no response. *See Rivers v. Union Carbide Corp.*, 426 F. 2d 633, 637 (3d Cir. 1970).

Similarly, the prosecution seeks to excuse the lack of a proper business record foundation for GX 1015 (1111ex-1115ex; see J. B. 125-27) [43] on the grounds that

42. The claim that there is no question about the authenticity of GX 121 is an overstatement. The document was not subpoenaed from USG's files by the prosecution (3312a, Tr. 12,879-80), and defense counsel objected to its admission on the grounds of no foundation as a business record (3320a, Tr. 12,889) *and* no foundation as to authenticity (3312a, Tr. 12,879; 3315a-3316a, Tr. 12,883-84). Although based on his brief examination of GX 121 on the witness stand, Mr. Watt testified that the document appeared to be from USG, that testimony was based only upon his recognition of names appearing in it (3311a-3313a, Tr. 12,877-81). He did not recognize the form of the document as one normally used at USG (3311a, Tr. 12,878); he did not recognize certain handwriting appearing on the document (3316a-3317a, Tr. 12,884-85); and he had never seen the document in the normal course of business (3317a-3319a, Tr. 12,886).

43. In support of the trial judge's admission of GX 1015, despite the clear lack of competency of the witness at trial who asserted that the document was a "business record" (see J. B. 126), the prosecution cites *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S. D. N. Y. 1951). It is clear even from the passage of the opinion quoted by the prosecution that the court in that case admitted two hearsay documents because "the subject matter of both is corroborated by other evidence," *Id.* at 513, thus providing some guarantee as to the "trustworthiness" of the infor-

the document was not hearsay because "not offered or admitted to show the truth of the matters contained in the document" (P. B. 280-81). This is obviously wrong. The prosecution admits that the document was offered "to prove that J-M and its co-conspirators were exchanging competitive information" (P. B. 280-81), and this offer was necessarily based on an assertion of truth about those statements made in the document which allegedly evidence such an exchange. The fact that the document was not offered to prove the truth of a *second* level of hearsay (i.e., the accuracy of the information exchanged) is true, but irrelevant to the prosecutor's argument at trial that certain statements in the document were true and thus proved an exchange of competitive information (Tr. 13,994-95).

As pointed out in defendants' original brief, in addition to improperly admitting hearsay documents, the court below also erred by admitting prejudicial hearsay testimony, such as the hearsay testimony by prosecution witness Huckleberry concerning alleged statements made to him by Quayle and Hardin of American Gypsum (see J. B. 123-25). The prosecution's citation of evidence *aliunde* which supposedly "connects" Quayle and Hardin to defendants' alleged conspiracy consists *solely* of American Gypsum's membership in the Gypsum Association and occasional Robinson-Patman verification [44] (P. B. 284-85). But the prosecution cites *no* evidence *aliunde* that in 1960

43. (Cont'd.)
mation as required by the authorities. *See United States v. American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 197 (3rd Cir. 1970). There was no such independent corroboration of the contents of GX 1015.

44. In August 1960 Quayle met with Bear of USG for the purpose of buying wallboard. At this meeting Bear had before him USG prices and freight bulletins which Quayle might have read upside down. He did not ask for nor was he given copies (367a-368a, Tr. 1333). This meeting adds nothing.

the Gypsum Association had any common plan to eliminate trucking or Texas Gypsum or that Quayle or Hardin was part of such a plan. The only independent "evidence" at the time of those declarations is thus based purely on "guilt by association", a concept frequently and routinely rejected by the cases. *See, e.g., United States v. Basurto, supra*, 497 F. 2d at 793; *United States v. Van de Carr, supra*, 343 F. Supp. at 1001. In view of the inflammatory nature of these hearsay statements regarding "the big boys" killing the "little" producers, failure to properly connect the declarations was clearly prejudicial.

D. The Trial Court's Partiality to the Prosecution Necessarily Prejudiced Defendants (J. B. III.D.; P. B. III.A.3).

Nothing in the prosecution's brief contradicts defendants' demonstration that the trial court was not evenhanded in its control of witness examinations and commented prejudicially on defendants' evidence. The improper restriction of defendants' cross-examination was exemplified during the testimony of the witness McCaskill, and the court's improper comments on defendants' evidence was exemplified during the testimony of defendants' economic expert, Dr. Cyert.

The prosecution does not dispute that McCaskill was a key prosecution witness regarding the *only* price increase in the statutory period claimed to be unlawful, nor does it dispute that on direct examination the prosecution was permitted to conduct a near word-for-word analysis of certain G-P documents which related to that price increase. Therefore, there is no question that defendants were entitled to fully cross-examine McCaskill on the May 1969 price increase. The prosecution attempts to excuse the trial court's limitation of that cross (Tr. 4857-58) by mis-

leadingly suggesting that "G-P's attorney had just finished reading a number of documents relating to that period of time and represented to the court that he was beginning to read a different series . . . that *relate to the same thing*" (P. B. 296). An examination of the transcript discloses that the alleged "other documents" referred to by the prosecution did *not* relate to the May 1969 price increase, but to an earlier period. Moreover, counsel's statement that the documents which did relate to the May 1969 price increase were a "series . . . that relate to the same thing" meant that each document within that new series related to the same subject (the May 1969 price increase), not that they related to the same subject as documents previously introduced. Thus, the fact remains that on the most critical issue about which McCaskill testified at trial, defense counsel were not permitted to conduct an examination even remotely comparable in scope to that permitted to the prosecution (J. B. 134-35).

With regard to the court's improper comments during the testimony of Dr. Cyert, the prosecution merely pretends that certain of those comments were never made. For example, the prosecution simply ignores that when some of Dr. Cyert's studies were offered into evidence, the court admitted them only after stating to the jury,

> "The Court: Well, I am going to admit these charts. Let the jury decide whether, in view of all this, they do demonstrate anything concerning price fixing.
>
> "But that's for the jury.
>
> "But I want the jury to bear in mind, as you listen, that this is based on theory and not on any comparison with another situation where there was actual price fixing." (3109a, Tr. 12,127).

This comment (along with those cited in defendants' original brief – J. B. 136-37) demonstrates the inaccuracy of the prosecution's claim that the trial court's comments "were not expressions of the court's opinion on that evidence or on Dr. Cyert's credibility" (P. B. 300). In a case where both the prosecution's arguments and the final instructions placed paramount importance on the question of "price stabilization", it simply cannot be assumed that the trial judge's comments undermining the credibility of Dr. Cyert's *factual* evidence showing extensive price cutting in the statutory period were not prejudicial.

IV. The Prosecution Has Admitted Its Misconduct and Its Justifications for Such Abuses Are Without Merit. (J. B. IV.; P. B. IV.).

The prosecution's propensity for arguing personal beliefs, matters not in the record, and speculative inferences drawn entirely from suspicion and prejudice is apparent even in its appeal brief. (See *supra* at 32-33). This misconduct also permeated the trial. The prosecution now urges that its excesses should be excused because the trial was lengthy and the import of its misconduct was diluted by the passage of time. To the contrary, colorful, improper conduct has its greatest prejudicial effect in a long trial where the evidence is voluminous, musty, and often boring. Inflammatory tactics are far more likely to distract the jury there than in the shorter, simpler cases where the factual issues are fewer. Time consuming though it may be to scrutinize the numerous record citations which demonstrate the prosecutor's prejudicial tactics, justice requires no less if jury verdicts are to be bottomed on the evidence and not on the prosecutor's personal belief that the defendants deserve to be convicted.

Many of the factual examples of misconduct are admitted, but the Court is asked to excuse it by subscribing to a cynical and distorted view of businessmen which presumes their predisposition toward price fixing. Some examples suffice:

Prejudicial Statement to Jury	*Prosecution Explanation for Statement*
1) Defendants were "strike-breakers." (1694a, Tr. 6201).	1) A real competitor would not sell to another competitor to supply strike shortages even if the sales were profitable (P. B. 347).
2) Defendants were "buddies" who met at "plush resorts." (Tr. 218; 329a, Tr. 549; Tr. 648-49; 1129a-1133a, Tr. 3357-65; 3770a, Tr. 13,834).	2) The prosecutor believes businessmen who use expense accounts are buddies and that the resorts were plush (P. B. 346).
3) Defendants would continue to fix prices if not convicted (3782a, Tr. 13,996).	3) The prosecutor personally concluded they would continue (P. B. 349).
4) Businessmen just naturally fix prices (3779a, Tr. 13,912; Tr. 13,798; Tr. 13,811; Tr. 13,918-19).	4) The prosecutor personally believes businessmen are so motivated (P. B. 350).

As demonstrated in defendants' joint brief, the inflammatory statements were clearly improper under the authorities (J. B. 156-58). Moreover, as the purported justifications for them emphasize, their only purpose was an appeal to prejudice.

The "obligation of fairness" is equally unrecognized in other explanations of misconduct offered by the prosecution. In an incident directly affecting three defendants, the prosecutor now claims innocent "misrecollection" in

misrepresenting evidence to the jury. Before the jury, the prosecutor accused Andrew Watt's counsel of "setting up a story" about the subject of a meeting between Mr. Watt and Mr. Walter of Jim Walter Corp. (parent of Celotex) on November 12, 1965 (3780a, Tr. 13,917). Embroidering this accusation, the prosecutor argued that all the while Mr. Watt's counsel had a contemporaneous document dated prior to November 17th showing the "story" was false and that "credit" was discussed on November 12th. The prosecutor now concedes that the document to which he supposedly referred (977 ex, GX 931), was dated December 16th—after the Walter meeting and even after USG's November 17th announcement date (P. B. 341).[45] Nor did the prosecutor correct the alleged "misrecollection" before the jury—it was intentionally left standing. Moreover, the prosecutor glosses over a second and more serious misrepresentation—the document says nothing about credit. Inadvertent and uncorrected zeal will not excuse a double-barrelled attack on the credibility of an individual defendant and his counsel and a completely false assertion that the defendant was discussing his company's internal pricing plans with a competitor prior to their public announcement.

A similar excuse is offered for the prosecution's fabrication of the exhibit GX 5006, which misled the trial

45. The prosecution's claim that the date of the document "makes absolutely no difference" (P. B. 341) is false. The prosecutor made the date *critical* by arguing to the jury that GX 931, which actually relates to telephone conversations *subsequent* to November 17 (3367a-3368a, Tr. 12,973-74), proved that Watt testified falsely about a Watt-Walter discussion *prior* to November 17 (3780a, Tr. 13,917; J. B. 147-48). This argument both impugned Watt's credibility and lent credence to the prosecutor's further assertion that when meeting with Walter prior to November 17, Watt "told [Celotex] of United States Gypsum's plans" concerning its upcoming November 17, 1965 price announcement (yet another prosecutorial statement in closing argument without basis in the record).

court and a witness and prompted the trial judge to malign the integrity of defense evidence before the jury (J. B. 145-47). The prosecution's creation of GX 5006 is passed off as at most an "innocent, and understandable, mistake" because the prosecution "had no reason to believe" that the two separate documents which it attached together to form GX 5006 were in fact unrelated (P. B. 337-38).[46] But whatever their personal beliefs, it was neither innocent nor understandable for the prosecutor, on his own initiative and without foundation, simply to attach together two separate documents and thrust them before a witness as an undivided whole with the demand: "Now, you are wrong, aren't you, Mr. Burch . . . Have you seen . . . the Georgia-Pacific price document dated July 31, 1968 rescinding that price? . . . I am going to show it to you." (1432a, Tr. 5364-65).

Elsewhere, the prosecution succumbs on appeal to the tactics it employed at trial of playing on the public distrust of lawyers and suggests improprieties on the part of defense counsel. Thus, it is asserted without record support[47] that witnesses "changed prior testimony, after con-

46. The prosecution misstates the record by suggesting that the improperly fabricated exhibit (GX 5006) is independently corroborated by other evidence (P. B. 337-38, n. 342). Contrary to the prosecution's assertion, G-P 437A *does not* refer to a chain of discounts from *G-P's published list prices*. The second so called corroborating document, G-P 90, reflects no sales at the G-P list price of $48.50, not because that was not G-P's list price, but because G-P could not sell its board at its own list when its competitors' prices were lower.

47. No amount of record checking will enable this Court to evaluate those prosecutorial excuses and justifications allegedly based on matters *dehors* the record—such as the utterly false claim that defense counsel "did not cooperate" with the prosecution on authenticity stipulations (P. B. 338). However, some insight into the validity of these nonrecord efforts to create prejudice is provided by the prosecutor's attempted soft-pedaling of his overbear-

sulting with defense counsel, in order to support a proposition the defense counsel wished to establish." (see, e.g., P. B. 337, n. 341). Similarly, in grudgingly conceding that it fabricated an exhibit, the prosecutor seeks to rationalize its misconduct by suggesting that evidence offered by Georgia-Pacific of its published list price in Pittsburgh should be disbelieved as part of a "calculated effort" to show nonuniformity of list prices among the defendants (P. B. 338, n. 342).

Repeating its familiar refrain, the prosecution excuses much of its misconduct through the purported "waiver" of objections (P. B. 338; 339-40; 341; 342; n. 344; 346; n. 349; 355). Defendants made nine unsuccessful mistrial motions because of the prosecutor's misconduct, including one encyclopedic one (J. B. 139 n. 143), and made numerous other objections as the misconduct occurred. Immediately following the prosecutor's inflammatory rebuttal argument, defense counsel rose to specify their objections, after the trial court had peremptorily denied objections made during the argument (e.g., 3844a-3845a, Tr. 14,749-50; Tr. 14,751-52), only to be told that the court would not hear the objections until *after* it had charged the jury (Tr. 14,815). Thus, cautionary instructions were precluded by the court's unconcern over defendants' objections to the prosecutor's misconduct (compare P. B. 355).[48]

47. (Cont'd.)
ing examination of the first defense witness, Baldwin, as a mere humorous interlude that generated "gales of laughter" (P. B. 342). To the contrary, defense counsel specifically objected to that misconduct and implored the court to exercise more control over the proceedings (2100a, Tr. 8494).

48. The prosecution also finds "waiver" in defense counsels' not requesting surrebuttal argument (P. B. 355)—an unusual procedure never extended to defense counsel in this case (Tr. 13,041-44; Tr. 13,053-54). Although after the jury had begun deliberations, the trial judge told defense counsel that he had previously informed them of this opportunity "in the record", no such record

Although defendants thus did preserve their objections to the prosecutor's misconduct, even failure to object would not have excused the persistent excesses which permeate the record.[49] *Gaither v. United States*, 413 F. 2d 1061, 1079 (D. C. Cir. 1969); *United States v. Graham*, 325 F. 2d 922, 928 (6th Cir. 1963). Objections made in the presence of the jury may even serve to magnify the prejudice of the misconduct. *See Dunn v. United States*, 307 F. 2d 883, 886 (5th Cir. 1962).

The prosecution also embraces another traditional excuse for its misconduct: "invited reply" (P. B. 334, n. 338; 345, n. 348; 348; 350-54). This Court has expressly rejected "invited reply" as an excuse for a principal type of misconduct committed by the prosecution here: the assertion of alleged facts not based upon or supported by the record. *United States v. Tucker*, 267 F. 2d 212, 214 (3d Cir. 1959). *Accord: United States v. Hayward*, 420 F. 2d 142, 147 (D. C. Cir. 1969). Moreover, the prosecution's invited reply arguments are contrived. For example, the principal justification for the misconduct occurring in rebuttal argument was that one defense

48. (Cont'd.)
citation was ever found despite the trial judge's enlistment of the prosecutor's staff to find it. (See P. B. 353, citing Tr. 14,794.) Even before the prosecutor completed his rebuttal, the trial judge specifically instructed the jury that "you have heard all you are going to hear from any of the defense counsel. They have concluded their closing arguments. The prosecution will continue their rebuttal tomorrow morning, and then I will charge the jury" (3844a, Tr. 14,717). No right to surrebuttal had ever been offered, and the trial court's mistaken after-the-fact notion cannot fairly be turned into a waiver.

49. Defendants stand by their full discussion and citations of all the prosecutorial misconduct contained in their joint brief. As this reply seeks to highlight, the prosecution actually repeats and enlarges upon its misconduct by its appeals to prejudice, reliance on rank suspicion, and resort to matters outside the record. Such tactics are plainly inconsistent with due process.

counsel made a "scathing" attack on the prosecutor during closing argument (P. B. 348). But the argument to which the prosecutor refers was necessitated by and based upon the prosecutor's misrepresentation of the Watt-Walter contact in November 1965, and its accompanying attack on counsel. (See *supra* at 51-52). Even the prosecution now concedes its misrepresentation (P. B. 340-41, 354), although it did not do so at trial. Incredibly, the prosecution now *relies* upon this response to its own admitted misrepresentation as not only excusing that misconduct (P. B. 341) but justifying still further misconduct during rebuttal argument. The only "invitation" to misconduct was issued by the prosecution to itself.

The prosecution relies heavily on two cases to excuse its misconduct as nonprejudicial. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174 (3rd Cir. 1970). Both cases actually condemned the prosecutorial tactics used in this case, but affirmed convictions only because there was overwhelming direct evidence including eye-witness testimony to hard-core price-fixing meetings and agreements. Unlike those cases, this prosecution suffered a complete void of direct evidence of price fixing and was sufficiently close, even under erroneous instructions, that the jury had to be coerced out of a "hopeless deadlock" in order to reach a verdict. Under these circumstances the prosecution's prejudicial misconduct necessitates a new trial.

V. The Trial Judge Improperly Coerced the Verdict by Conveying to the Jury That a Deadlock Was Impermissible. (J. B. V.; P. B. V.)

The prosecution's argument (P. B. 353-69) that a large trial record requires time-consuming jury deliberations begs the question presented in this case. It is *undisputed* that the jury, through its foreman, expressly stated in the clearest possible terms its understanding that the trial judge required a verdict "one way or the other." Therefore, this Court need not "presume" or "infer" the coercive impact of the trial judge's mishandling of the jury. The jury itself stated it.

It appears that for the first 5½ days the jury deliberated constructively. During this period they asked for specific documents and for additional instructions. The reported illnesses and mental strain may not have precluded meaningful deliberation. However, the product of deliberations was an ironclad deadlock.

Late on the sixth day the jury reported:

> "Your Honor,
>
> > We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors." (4061a, Docket Entry 322, ¶24).

The trial court's response was calculated to convince the jurors a deadlock was unacceptable. The jury was scolded and given a third "dynamite" type charge to "deliberate with a view toward reaching agreement," while eliminating the usual instruction to "decide the case for yourself." (4017a-4019a, Tr. 13,154-55).[50]

50. The prosecution cites no authority which sanctions the *repetitive* use of "dynamite" charges. Indeed, the prosecution places principal reliance upon *United States v. Fioravanti*, 412 F. 2d 407

The next day the court met with the foreman who confirmed the deadlock in the clearest terms possible:

> "We have taken enough ballots now, and we have had enough discussions, and *the way it is divided is not going to be settled by any document, any remembrance of testimony.*"
>
> • • •
>
> "THE COURT: Are you telling me this jury is *hopelessly deadlocked* and will never reach a verdict?
>
> "MR. RUSSELL: *In my opinion, it is . . . .*" (4066a-4068a, R. Tr. 4-6) (emphasis added).

The court's reaction to this expression of deadlock could only have convinced the foreman that the jury was *required* to break the deadlock: [51]

> "MR. RUSSELL: You are after a verdict *one way or the other.*
>
> "THE COURT: *Which way it goes* doesn't make any difference to me." (4069a, R. Tr. 7) (emphasis added).[52]

50. (Cont'd.)
(3rd Cir. 1969), *cert. denied sub nom. Panaccione v. United States*, 396 U. S. 837 (1969). In that case, the Court did not reverse in part because "the Allen Charge was incorporated into the body of the main charge and not used in its usual ominous context, that of a supplemental or 'dynamite' charge . . . ." *Id.* at 419.

51. The trial court improperly informed the foreman of the parties' earlier stipulation to a verdict of eleven (J. B. 180, n. 165). The trial judge's statement that one juror could be excused "for health reasons", and then just dropping the subject upon learning that more than one juror might have to be excused, further evidences the court's pressure for a verdict.

52. The prosecution deceptively rearranges the conversation between the foreman and the court to make it appear that the court responded to the foreman's statement "You are after a verdict one way or the other" by saying "Oh, I am not after anything." (P. B. 366). This is not accurate. The court responded "which way it goes doesn't make any difference to me." (4069a, R. Tr. 7).

The court's reply confirmed the foreman's conclusion that the court would require "a verdict one way or the other," ruling out a deadlock in no uncertain terms.[53] These statements by the court clearly convinced the exhausted and ill jury that they had no choice but to break the deadlock. Under these circumstances, laymen could reach no other conclusion.

As a result, the vote was changed and a verdict delivered the next morning.[54] The court's mishandling of the jury thus deprived defendants of their Constitutional rights to the jury's true verdict as twice reported in the most dispassionate and intelligent terms. Moreover, in view of the overall handling of the jury deliberations, it cannot be said that the verdict finally reported represents the true result of a proper deliberative process. Justice requires reversal.

53. It is the trial judge's confirmation that a verdict was necessary, coupled with repetitive "dynamite" charges delivered in response to two expressions of deadlock by an exhausted and ill jury, which makes inapposite *Virgin Islands v. Gereau*, 502 F. 2d 914 (3rd Cir. 1974), *cert. denied*, 420 U. S. 909 (1975). In that case, where no claim of juror illness was made, the trial judge "instructed the jurors that . . . they need not reach a verdict and could continue to disagree." *Id.* at 933. Moreover, "the [jury's] prior communications were not . . . indications of deadlock." *Id.* at 936.

54. The prosecution cites *United States v. Grosso*, 358 F. 2d 154 (3rd Cir. 1966), rev'd 390 U. S. 62 (1968), to support its claim that the subsequent polling of the jurors was significant (P. B. 369). *Grosso* is distinguishable from this case because there the evidence of guilt was "overwhelming," the trial court gave no "dynamite" charges, and there was no "proof that coercion in fact existed." *Id.* at 158, 160.

CONCLUSION.

For the foregoing reasons and the reasons advanced in Appellants' Joint Brief, the judgments below must be reversed and acquittals granted, or, in the alternative, new trials must be ordered.

Respectfully submitted,

ROBERT C. KECK
JAMES G. HIERING
VALENTINE A. WEBER, JR.
KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
Chicago, IL 60606
Counsel for United States Gypsum Company

H. FRANCIS DELONE
ALFRED W. CORTESE, JR.
JOHN F. WILSON, III
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Counsel for National Gypsum Company

CLOYD R. MELLOTT
WILLIAM B. MALLIN
BARTON Z. COWAN
J. GARY KOSINSKI
D. RICHARD FUNK
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, PA 15219
Counsel for Georgia-Pacific Corporation

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
JOSEPH R. LUNDY
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, IL 60606
Counsel for The Celotex Corporation

PAUL C. WARNKE
THOMAS RICHARD SPRADLIN
CLIFFORD, WARNKE, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for Messrs. Colon Brown and J. P. Nicely

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
JEFFREY S. DAVIDSON
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Counsel for Andrew J. Watt

CROSS-REFERENCE TABLE TO JOINT APPEAL BRIEFS.

Appellants' Joint Brief (ARGUMENT)	*Prosecution's Brief**	*Appellants' Joint Reply Brief* (ARGUMENT)
I.		I.
A.	ARGUMENT II.A. & C.3.	I.A. & B.
B.	STATEMENT OF CASE III.A.	II.B.
C.		
1.	ARGUMENT II.E.	
2.	ARGUMENT II.B.2.	I.C.
3.	ARGUMENT II.C.1. & 2.	I.C.
4.	ARGUMENT II.D.2.	III.B.
D.	. . .	
II.		II.
A.		
1.	STATEMENT OF CASE III.B.3.	II.C.
2.	STATEMENT OF CASE III.C.1.2.	
3.	STATEMENT OF CASE III.D.1.	II.C.
4.	STATEMENT OF CASE III.E.3.	II.C.
B.		
1.	STATEMENT OF CASE III.E.1.	
2.	STATEMENT OF CASE III.B.1.-4. & C.	II.C.
3.	STATEMENT OF CASE III.D.1.	II.C.
4.	STATEMENT OF CASE III.C.2.	
C.	ARGUMENT I.B.1.	II.A.
III.		III.
A.		III.B.
1.	ARGUMENT III.B.2.a.	III.B.
2.	ARGUMENT III.B.2.b.	III.B.
3.	ARGUMENT III.B.2.c.	III.B.
B.	ARGUMENT III.C.	III.A.

Appellants' Joint Brief (ARGUMENT)	*Prosecution's Brief**	*Appellants' Joint Reply Brief* (ARGUMENT)
C.		III.C.
1.	ARGUMENT III.A.2.	III.C.
2.	ARGUMENT III.A.1.	III.C.
3.	STATEMENT OF CASE, Pg. 66, n. 69	
D.		III.D.
1.	ARGUMENT III.B.2.d.	
2.	ARGUMENT III.A.5.	III.D.
IV.	ARGUMENT IV.	IV.
V.	ARGUMENT V.	V.

* Section III.A.3. of the prosecution's brief is addressed in the Supplemental Reply Brief of Appellant Andrew Watt. Section III.A.4. of the prosecution's brief is addressed in the Supplemental Reply Brief of Appellant Celotex. Section III.A.6. of the prosecution's brief is not treated because it is not relevant to any issue on this appeal.